SOURCES FOR THE INTERPRETATION OF EQUALITY RIGHTS UNDER THE CHARTER:

A BACKGROUND PAPER

MINISTRY OF THE ATTORNEY GENERAL
ONTARIO

This paper has been developed from a series of discussions held on background Charter analyses prepared by lawyers in the Ministry [illegible] the Attorney General. Although both the analysis and the conclusions remain preliminary, this paper is being released at this time to provide a research tool for those who will be grappling with Section 15 in the coming months.

The paper does not represent the position of the Attorney General or the Ministry, nor, except in relation to the issue of constructive discrimination, does it suggest in any way the position that will be taken in any legal opinions or litigation. Its release has the limited purpose of encouraging legal discussion and providing sources for the analysis of section 15.

The paper was originally published in January of 1985. Owing to substantial, continuing demand for copies, it is being reprinted now with limited amendments reflecting the major developments of the past few months. Time has not permitted a complete revision of the paper.

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Sources for the Interpretation of Equality Rights Under the Charter: A Background Paper

> s.15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

PREFACE

The *Canadian Charter of Rights and Freedoms* came into force on April 17th, 1982 for all purposes other than the implementation of section 15. Section 15 came into effect on April 17th, 1985, after a three year delay provided for by section 32(2).

The Ontario Government has conducted a thorough assessment of its legislation to determine whether it conforms to section 15. A Bill amending fifty-eight statutes to bring them into better conformity with the equality rights provisions of the Charter was introduced in the Ontario Legislature on June 11, 1985. Before that legislation could be prepared, it was necessary to develop a thorough appreciation of section 15 in order to establish guidelines for the assessment of legislation. This paper represents the analysis which was undertaken for this purpose.

Ontario's approach to section 15 of the Charter, and to constructive discrimination, was outlined by the then Attorney General, Robert Welch, Q.C., in a statement released on April 10, 1985. A substantial portion of that statement is reproduced here to provide a context for the following analysis:

> ...Ontario has a long tradition of promoting and supporting basic human rights and freedoms. Our Omnibus Bill will reflect this tradition, and will ensure that Ontario statutes reflect the government's commitment to the equality rights provisions of the Charter.
>
> I want to emphasize that our Omnibus Bill, extensive as it will be, should not be seen as a final response to the Charter. We will continue to work internally on other issues, and we are aware that individuals and groups in the community will want to pursue issues of their own.
>
> Our door will be open. We want to work with the people of this province to find appropriate responses to equality rights issues. I believe that we can resolve most Charter issues through legislation rather than through litigation.
>
> Accordingly, I invite persons with concerns about equality rights to bring them to our attention before commencing litigation. If we can resolve the issue by legislation, we will. Legislation has the obvious advantage of certainty and speed. It will minimize the need for individuals to devote their resources to legal fees. It allows complex issues of social and economic policy to be addressed in the forum best equipped to deal with them. It will also minimize confrontation on many issues on which I believe there is no fundamental difference of principle as between the government and concerned groups.

My own view is that the Charter establishes a realistic measuring stick of fairness in our society. It promotes the principle that individuals should be judged on their own merits, rather than on the basis of perceptions about the general characteristics of the groups with which they are identified. Ontario has a strong record of promoting this merit principle. We have given effect to it in our Human Rights Code and in other important legislative initiatives. Ontario's support made the Charter of Rights and Freedoms possible. We intend to continue our strong support for the Charter by building its fundamental premises into the very fabric of our society.

I want to emphasize that Ontario's approach to the Charter is not a narrow or restrictive one. We support the broad, general equality objectives articulated by section 15 of the Charter. We feel that a results-oriented approach to the Charter is an appropriate one.

...In preparing [our omnibus] legislation, we have been guided by the principle that Ontario legislation should conform to the spirit as well as to the letter of the Charter. We have not taken a technical, narrow view of the equality rights provisions of the Charter.

. . .

The Omnibus Bill will represent only the first part of an ongoing effort. It is wide-ranging in scope and very serious in purpose. We look forward to working with groups and individuals who have further proposals for change.

Let me turn now to [an issue] ... of particular concern to women and to minority groups. That issue is whether section 15 of the Charter applies to a type of discrimination known as constructive or systemic discrimination. That kind of discrimination results when an apparently neutral law has a disproportionate, negative impact on a group such as women or a racial minority or a religion. For example, a requirement that police officers meet certain fixed height and weight requirements does not on its face draw any distinction on sexual or racial grounds. However, in application it may exclude a great many women and certain minority groups. Under the doctrine of constructive discrimination, such a requirement is forbidden unless it is demonstrated that all police officers must possess the required height and weight in order to properly discharge their functions. In other words, unless the requirement is necessary for the job, its discriminatory impact means that it cannot be maintained. Many police forces have now eliminated the use of height and weight requirements.

The language in which section 15 of the Charter is written does not explicitly include constructive discrimination, nor does it specifically exclude it. The language of section 15 is open to both interpretations

However, in considering the position counsel for the Ontario government should take when this issue is raised in the courts, I have noted the Charter's role as an important articulation of the underlying premises of our society. One of these is surely that no barrier, hidden or overt, should bar any member of society from advancing on his or her own merit.

I do not believe that it would be consistent with Ontario's support for the overall thrust and purpose of the Charter to assert that the Charter offers no remedy to persons who suffer from constructive discrimination. I am of the view that when section 15 is viewed in the context of the Charter as a whole, and in light of the evolution of the protection of human rights in Canada, protection from constructive discrimination is properly found within it.

In this connection, I have noted that in 1981 Ontario included the concept of constructive discrimination in its Human Rights Code. This was done in recognition of an international trend to make human rights laws respond to the hidden barriers which now confront many members of minority groups.

As the nature of discrimination has changed, so have human rights laws. Initially human rights laws were designed to deal with malicious discrimination, clearly motivated by dislike or an animosity towards certain groups. As this form of discrimination subsided, greater attention was paid to discrimination based not on active dislike, but rather on stereotypical perceptions about the abilities of members of a group. Human rights laws were enacted to respond to this kind of discrimination, but in the absence of a prohibition on constructive discrimination, are powerless to deal with the most pervasive kind of discrimination now faced by minority groups and women -- discrimination which is so deeply rooted in our society that we simply cannot see it.

Having recognized this in amending our Human Rights Code in 1981, it would be anomolous for us to assert that the same concept should not be found in the Charter. Moreover, it would not be appropriate for the Ontario government to seek to be exempt from this doctrine under the Charter, when we have determined that it sets an appropriate standard for the private sector and the government in activities covered by the Human Rights Code.

As the effective date of the equality rights provision approaches, I thought it would be helpful to indicate the position which counsel for the Ontario government will be taking on this issue in Charter litigation. Our position will be that the concept of discrimination in section 15 can include constructive discrimination, as I have defined it above. We will agree that claims from persons who feel they have been disadvantaged on grounds such as race or sex by laws or policies which are expressed in non-discriminatory terms, can be brought under section 15. We will of course deal with each case on its own facts and merits. While we will not argue that section 15 cannot apply to such claims, in any particular case counsel for the Ontario government may oppose the claim on the basis that there is no factual merit in the claim, or no differential impact, or that the differential impact can be justified under section 1 of the Charter.

Similarly, in our review of Ontario legislation in light of the Charter we have taken the approach that constructive discrimination, where found, should be removed unless it can be justified. Since our statute audit was essentially confined to a review of the language of the statutes, it did not tend to turn up such forms of discrimination. However, where constructive discrimination was found, it is being reviewed with a view to possible amendments.

I hope that this articulation of our position on this issue will be of assistance to persons considering Charter litigation. We are prepared to work with concerned groups to minimize the need for litigation. We would be happy to review laws which individuals or groups feel have a discriminatory impact, with a view to considering appropriate amendments. This could save individuals and the government the expense of litigation, and could result in quicker and more certain remedies.

Although we would prefer to work with individuals who have equality rights concerns, rather than engage in litigation, I recognize that honest differences of opinion will necessitate some litigation. Where equality rights litigation does occur, our desire will be to have the merits of the case considered by the court. Accordingly, as I indicated, we will not argue that claims of constructive discrimination cannot be entertained under section 15.

. . .

SUMMARY OF PAGES 3-14

I. AN OVERVIEW OF THE PAPER

A. Introduction

The paper discusses issues which will arise out of section 15, with the caution that tentative conclusions based on caselaw to date are subject to caselaw decided subsequent to publication of the paper.

B. Matters Considered in the Paper

This section sets out the major issues discussed in the paper:

1. Background Material

2. Sections 15 and 1: The Issues

(a) Section 15: Basic Issues

(i) The meaning of the concept of equality;
(ii) The status of "equal before and under the law";
(iii) The role of the anti-discrimination clause;
(iv) The meaning of discrimination;
(v) Treatment of the enumerated grounds;
(vi) Treatment of non-enumerated grounds;
(vii) The effect of section 28 on sex equality in section 15;
(viii) Section 15(2) as defence and remedy.

(b) Section 1: Basic Issues

(i) How section 1 applies to section 15;

(ii) The requirements of section 1.

(c) Procedural Issues

I. AN OVERVIEW OF THE PAPER

A. Introduction

This paper considers some of the major issues which will arise out of the application of section 15, the resolution of which will define the nature of the responsibility on government to conform to the requirements of section 15. The paper also necessarily deals with section 1 and with its effect on section 15. Based on considerable discussion among a group of lawyers familiar with constitutional litigation generally and with the Charter specifically, the paper provides a detailed examination of the major issues raised by section 15. Nevertheless, since there is as yet only slight jurisprudence under section 15, the paper should be viewed as a preliminary attempt to define the issues and to suggest possible interpretations of section 15.

Because the comments made in the paper and any conclusions reached therein have been based on caselaw dealing with other parts of the Charter, together with a general understanding of the process leading to the Charter, they are subject to revision as the courts begin to provide definitive interpretations of section 15. Even in regard to Charter provisions which have now been in force over three years, the Supreme Court of Canada has only recently begun issuing its first judgments. These decisions unavoidably leave many important issues unconsidered by the highest court. The increasing number of Court of Appeal decisions, while reaching some significant conclusions about the application of the Charter, must be treated tentatively until there is confirmation of these conclusions by the Supreme Court of Canada. References in the paper to caselaw must be read in that light.

B. Matters Considered in the Paper

1. Background Material

The Charter sets out a series of rights and freedoms which are guaranteed to individuals in Canada, subject to limitations which must accord with the requirements of section 1. Section 15 guarantees equality rights, just as, inter alia, section 2(b) guarantees freedom of expression and section 6 guarantees mobility rights. Instead of indicating limitations in relation to each particular right or freedom, the framers of the Charter have included section 1 which appears to apply to all sections of the Charter, including section 15, although a different view on this point is explored below at pages 121ff. In considering section 15, it is therefore necessary also to consider section 1 and its possible relationship to section 15.

However, in order to understand some of the comments made about both section 15 and section 1, it must be appreciated that the Charter, while a new constitutional document, has arisen out of Canadian legal and political tradition. In some ways, the Charter continues this tradition, while in others it departs from it. The first part of the paper indicates some of the ways in which the Charter both reflects and departs from Canadian legal and political tradition.

The paper first considers various materials of which the framers of the Constitution were aware and which have already been considered by the courts as tools of interpretation. These include the Canadian Bill of Rights (considered in, for example, The Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357), the United States Bill of

Rights (considered in, for example, Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145, and the International Conventions (considered in, for example, Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home (1983), 44 O.R. (2d) (Div.Ct), rev'd on appeal (1984), 48 O.R. (2d) (Inflation Restraint Act case); R. v. Videoflicks et al. (1985), 48 O.R. (2d) 395 (C.A.); under appeal to the S.C.C.). All these documents contain concepts similar to those found in the Charter. However, their context, and the experience with them, may be sufficiently different from that anticipated for the Charter that they can be applied in Charter cases only with careful consideration of the implications of doing so. Nevertheless, some understanding of these sources and the appropriateness of their application can lead to a greater appreciation of the meaning of various Charter provisions. Accordingly, they are discussed prior to a more detailed discussion of the sections themselves.

The background section continues with a consideration of Canadian traditions and the historical, economic and political factors which may have had an impact on the Charter's development. In this sense, the Charter, while "new" in its provision of constitutionally guaranteed rights and freedoms, also inherits the reality of the Canadian legal and political systems. Analysis under the Charter is, perhaps even more so than division of powers constitutional litigation, concerned with historical, political and social arguments, in addition to legal ones, narrowly defined. Thus this portion of the paper discusses the role of the "rule of law" tradition which figures in the Preamble, in section 1 and in section 15 itself. The evolution of section 15 through the process which culminated in the Charter, and the expectations of the beneficiaries of the rights as illustrated by the Joint Proceedings of the House of Commons and the Senate, are also considered. The major point of departure in the Charter from the traditions which are briefly considered in this background section is the changing role of the courts and the modified significance of the principle of parliamentary sovereignty.

In addition to the Canadian Bill of Rights, another domestic source which may be of particular value in interpreting section 15 is human rights caselaw. However, there are some major distinctions between human rights legislation and the Charter. These are reviewed, together with a consideration of the use of other domestic sources, such as Hansard, the Joint Proceedings, and earlier versions of the Charter.

Section 15 and section 1 are then assessed against this backdrop. Set out below are the basic issues which will later be discussed in some detail, and from different perspectives, throughout the paper. It will be evident that these issues cannot really be treated as if they are distinct from each other, although it is necessary to do so in order to appreciate fully the nature of the issues.

2. Sections 15 and 1: The Issues

(a) Section 15: Basic Issues

Section 15 states:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Although section 15 would appear to be a much more complicated section than many others in the Charter, there is no reason to believe that this complexity requires that it be treated differently than the courts have so far treated other sections: that is, as a right which can be defined initially without internal qualification. The issues which must be addressed in order to determine the meaning of section 15 are set out below, with an indication of the relevance of each issue for understanding section 15.

(i) The meaning of the concept of equality: The concept of "equality" as it appears in section 15 is fundamental to an understanding of the scope of section 15's guarantee. The meaning of equality is important in helping to determine the interests protected by section 15 and the groups, not already listed, which might be recognized by the judiciary as deserving of constitutional protection. A major issue which turns on the definition of equality for the purposes of section 15 is whether economic rights are independently protected by section 15.

(ii) The status of "equal before and under the law": Another section 15 issue is whether the opening words of section 15 guarantee an independent right of equality before and under the law, rather than simply constituting a declaration of legal status. The opening words are not expressly stated to be a right, but this does not mean that a right has not been created by those words. If a right were created, it might permit individuals to claim section 15 protections as individuals, rather than as members of protected groups. In that case, most, if not all forms of differentiation would be subject to Charter review.

(iii) The role of the anti-discrimination clause: It will be noted that section 15 guarantees a right to equality "without discrimination" on certain grounds. The question in relation to this part of section 15 is whether or not section 15 guarantees a "positive equality right" or a "negative anti-discrimination right". Is the emphasis to be placed on equality or on the right not to be discriminated against? Put another way, can an individual claim under section 15 on the basis that he or she, as an individual, has not been treated equally, regardless of the reason, or must the individual show an infringement or denial of the equality right on a prohibited ground? The connection between this and the above issue, that is, the status of "equal before and under the law", in part relates to whether or not "without discrimination" modifies everything which precedes it or only the immediate words, "the right to the equal protection and equal benefit of the law". Should we see section 15 as partly an equality guarantee and partly an anti-discrimination guarantee? If so, it could be argued that "without discrimination" modifies only "the right to the equal protection and equal benefit of the law", and not "equal before and under the law". This is particularly important if the latter constitutes a separate right.

(iv) The meaning of discrimination: There are two sub-issues in relation to this broad issue. The first issue is whether the term "discrimination" itself contains an implied qualifier apart from the section 1 qualification; the second issue is whether constructive discrimination is prohibited by section 15.

Some people argue that there is no discrimination if the individual lacks the capacity to enjoy a right or benefit. If a "capacity" qualification is attached to the term "discrimination", there are significant implications for the case which the plaintiff must make under section 15. Such an interpretation would make it much harder for a plaintiff to make a prima facie case under section 15 because he or she would have to prove capacity to enjoy the right which had been denied. For example, if an applicant were denied a job selling newspaper subscriptions over the telephone on the basis that he was unable to speak clearly, it would not be discriminatory to refuse to hire him if this were true. Accordingly, to advance a claim of discrimination, the plaintiff would have to prove, as part of his case, that he could speak sufficiently clearly to do the job.

The opposing view is that discrimination occurs when a distinction is made which has adverse consequences for the individual involved. The onus would then be on the government to meet the section 1 burden of showing that the discrimination was not unreasonable, perhaps because the individual lacked the capacity to enjoy the right or freedom. This question is a significant one in terms of balancing the responsibility of the plaintiff and of the government in relation to claims under 15.

The other sub-issue relating to the meaning of discrimination is whether or not it includes a prohibition against constructive discrimination. Constructive discrimination is that which results from the effects of legislation or policy rather from that which appears on the face of legislation or policy; for example, height and weight requirements, which are neutral on their face, but which can disadvantage women and some racial minorities. The answer to this question has implications for the value of section 15 for certain groups who are protected by 15. The Ontario government accepts the principle that constructive discrimination can be addressed by section 15. This portion of the paper sets out the reasons for that position and the difficulties associated with the concept.

(v) The enumerated grounds: Section 15 sets out several grounds upon which discrimination is not allowed. These are race, national or ethnic origin, colour, religion, sex, age and mental or physical disability. These can be considered the "enumerated grounds" or "enumerated groups".

It will be seen that the grounds are not all the same kinds of grounds; for example, race, national or ethnic origin, colour and in most cases, sex, cannot be changed by the individual and the individual has no control over them. On the other hand, religion is a choice of an individual; yet, although it is within the control of the individual, it may be something that in fact is extremely difficult to renounce. Age, although it cannot be changed by the individual, is not something which is constant since people grow older. Finally, mental or physical disability may be a condition which cannot be changed by the individual, but which may sometimes be susceptible to change. Because the grounds differ in these ways, it has been argued that they should also be treated differently in terms of the extent to which discrimination may be allowed on each ground. It should be easier, on such a view, for the government to justify discrimination on some grounds than others. On the other hand, all these grounds have been set out in section 15 without any indication that they are to be treated differently. Both these views are considered in the paper.

(vi) Non-enumerated grounds: The wording of section 15 indicates that those grounds which are listed therein are not the only grounds which will be protected and that there are other grounds which the courts are likely to recognize as deserving of section 15 protection. The list is considered to be open-ended because the phrase "without discrimination" is not in itself limited by particular grounds, but instead is followed by the words "and, in particular, without discrimination based on [the enumerated grounds]".

Inevitably, members of other self-defined groups will attempt to bring themselves within section 15 and the courts will have to develop some guidelines to help them decide whether to grant standing to these potential plaintiffs on the merits of their claim. Some possible guidelines are set out as part of the discussion of non-enumerated groups/grounds and are applied to certain grounds which may be candidates for inclusion.

Another issue is whether the grounds which are enumerated and those which are not, but which are granted protection by the courts, will be treated differently under section 1. Will it be easier for the government to justify discrimination on non-enumerated grounds than it will be for the government to justify discrimination on the enumerated grounds?

(vii) The effect of section 28 on sex equality in section 15: Section 28 states:

> 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Section 28 may mean that sex discrimination will be treated differently from discrimination on any of the other protected grounds under section 15, enumerated or not enumerated, by removing it from the effects of sections 1 and 33. However, it is also possible that section 28 will be treated as a "caution", ensuring that sex discrimination would be subject to the highest standard of review applied by the courts to any ground. Finally, it has also been argued that section 28 will not exclude sex discrimination from the effect of section 1, but will exclude sex equality from the section 33 override. All these interpretations are discussed in this paper.

(viii) Section 15 as a defence and a remedy: Section 15(2) (set out above at p.7) permits affirmative action programs. It means that treatment which might otherwise be considered discriminatory will not be prohibited by section 15(1) because the treatment assists a group which is the subject of the legislation. Nonetheless, the courts may assess such a program against judicially determined standards. Possible standards are considered in the paper.

Section 15(2) is available to the government to defend or justify legislation or activity. It may also be available to a successful plaintiff as a remedy. Standards, if developed, will presumably apply to programs established by government or requested by plaintiffs.

An issue to be determined is whether section 1 will be applied to such programs. If it does, the program would have to be justified in the same manner as any limitation on rights. If it does not apply, then whatever standards the court would expect such programs to meet could be determined under section 15(2) itself, without reference to section 1.

(b) Section 1: Basic Issues

Section 1 states

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

(i) *The extent to which section 1 applies to section 15*: Some people have argued that the reasonable limits test in section 1 does not apply to section 15 since it is possible to read a limit into section 15 (for example, that it applies only when the plaintiff has the capacity to enjoy the benefit denied or satisfy the requirement imposed). Then section 15 would be similar to a section such as section 8 which prohibits "unreasonable search or seizure", thereby containing its own limit. When a section contains its own limit, particularly an express limit, but also perhaps an implied limit, it is possible that the reasonable limits part of section 1 may not apply. Other people are of the view that section 15 is an internally unqualified right to which all the requirements of section 1 apply.

(ii) The requirements of section 1: Section 1 can be divided into four components: "reasonable limits", "prescribed by law", "as can be demonstrably justified" and "in a free and democratic society". The paper considers ways to decide which limits are reasonable and justified, what is required of the government to satisfy the notion of demonstrably justified, what "prescribed by law" means, and how the courts will treat the component "in a free and democratic society". These requirements have already been discussed, with varying degrees of elucidation, by courts at different levels, but with only brief comments to date from the Supreme Court of Canada.

(c) Procedural Issues

Following the discussion of the specific issues arising out of section 15 and section 1, the paper very briefly considers some of the major procedural issues in relation to both sections. This discussion is meant merely to alert litigants to the issues.

Four issues are raised under section 15. These are: standing (who is a proper plaintiff?); the onus on the plaintiff under section 15 which will in part depend on whether the term "discrimination" is qualified; the evidence which may be produced by the plaintiff under section 15; and remedies under section 24(1).

Three procedural issues are raised in relation to section 1. These are: that the onus is on government under section 1, as stated by the Supreme Court of Canada; when the inquiry shifts from section 15 to section 1; and the effect of a finding that legislation is inconsistent with the Charter.

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Constitution, including Charter, to be given a broad, liberal and purposive interpretation.

B. Use of Selected Domestic Legal and Quasi-Legal Sources

Discussion of the role of human rights legislation, transcripts of the proceedings of the Joint Committee of the Senate and the House of Commons, statements from Hansard and earlier versions of the Charter.

Discussion of the caution with which each source to be applied.

C. The Application of the Charter

The Charter applies to legislative and executive branches of government, including administrative action. Discussion of "state action" and "state function" doctrines to determine under what circumstances private activity might be subject to the Charter.

D. Pre-Charter Protection of Civil Liberties

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4. The Impact of the Bill of Rights on the Charter

Section 52(1) of the Constitution Act, 1982 mandates that laws inconsistent with the Charter are of no force or effect to the extent of the inconsistency. Thus the entrenchment of rights in the Charter can be seen as "an enlargement of the qualification of parliamentary sovereignty to which Canadian legislative bodies have always been subject: legislative activity must conform to the supreme law of the Constitution".

Although the language in the Bill of Rights and that in the Charter are in some provisions similar, in other provisions they differ.

The Supreme Court of Canada has indicated that the Charter either permits or requires fresh interpretation.

E. Protection of Civil Liberties in Other Jurisdictions

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Discussion of relevant provisions of international documents.

2. U.S. Bill of Rights

Discussion of the relevance of American jurisprudence to cases under the Charter, including advantages and disadvantages of applying U.S. caselaw.

F. Social, Political, Cultural and Economic Factors in Relation to an Analysis of the Charter: the Use of Extrinsic Aids

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Discussion of the enhanced role of the courts under the Charter in declaring inconsistent legislation of no force and effect.

II. BACKGROUND TO UNDERSTANDING THE CHARTER

A. Principles of Constitutional Interpretation Underlying This Analysis

The Supreme Court of Canada has now indicated that it views the Charter as a new constitutional document. It has made it clear that the Charter demands a more critical examination by the courts of a denial of a guaranteed right or freedom than did the Bill of Rights. The Supreme Court will expect government in most instances to provide evidence justifying qualifications of Charter rights or freedoms. They will also expect that legislatures will act in a positive fashion to meet the requirements of the Charter. There is no reason to suppose that these principles of interpretation will not apply to equality rights under section 15.

Because of its constitutional status, a number of courts, including the Supreme Court of Canada, have ruled that the Charter requires that where a provision can be given a narrow or a broad meaning, it should be given the broad meaning. The provisions of the Charter are to be interpreted liberally. This canon of constitutional interpretation has been explicitly accepted by the Supreme Court of Canada in *Skapinker* and *Hunter* v. *Southam*; as summarized by Chief Justice Dickson in the Supreme Court decision of *R.* v. *Big M Drug Mart Ltd.*, [1985] 3 W.W.R. 481 the meaning of a Charter guarantee was said in *Southam*

> to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or

> freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this court's decision in [Skapinker] illustrates, be placed in its proper linguistic, philosophic and historical context (p.524). (Emphasis in original.)

B. Use of Selected Domestic Legal and Quasi-Legal Sources

This short section discusses the kinds of materials which might be employed in Charter cases by both individual plaintiffs and government in order to explain the meaning of a particular section or the tenor of the Charter as a whole. Human rights caselaw might have some applicability to section 15 and to a lesser degree to section 1. Other material submitted to the court might include, among other matters, the transcripts of the Proceedings of the Joint Committee of the Senate and the House of Commons, statements from Hansard and earlier versions of the Charter. These are also briefly discussed below. Separate reference will later be made to the Canadian Bill of Rights since it is a quasi-constitutional document, in some respects comparable to the Charter.

1. Human Rights Legislation

To date most of the anti-discrimination cases in Canada have been decided under federal and provincial human rights legislation. The presence of the anti-discrimination clause in section 15 suggests that some of this caselaw will be raised in challenges brought under that section. Accordingly, the caselaw is considered later in the paper in some detail, particularly in relation to the meaning of discrimination, the recognition of non-enumerated groups and the test under section 1. In assessing these references to human rights legislation it should be kept in mind that such legislation does not have constitutional status and is directed primarily at resolving specific disputes between individuals.

In addition, a prominent human rights legislation exemption or defence is the *bona fide* qualification. This has been interpreted strictly, as discussed in some detail below, at pp.149ff. Some human rights statutes contain a reasonableness exemption, either in place of or in addition to, the bona fide qualification. This type of exemption has been interpreted more broadly than the bona fide qualification in some cases. Some courts have considered a wider range of factors in relation to the reasonableness exemption than in relation to the bona fide exemption. The distinction between and application of these qualifications or saving provisions must be considered in relation to the reasonable limits permitted by section 1. It should be remembered that while the bona fide qualification caselaw may be useful in raising some of the factors to be considered under section 1, there is no basis for arguing that it has any legal relevance to the section 1 reasonableness standard.

Generally, then, although human rights caselaw as our primary source of anti-discrimination theory and practice may be relevant to Charter cases, it should be applied, as should other caselaw, only after considering it in light of the differences (and similarities) between human rights legislation and the Charter.

2. Joint Proceedings of the Senate and House of Commons

Several references are made in this paper to the testimony of witnesses before and comments by members of the special Joint Committee of the Senate and the House of Commons on the Constitution. These references are included to assist in interpreting various sections and to give a flavour of the evolution of the Charter.

Nonetheless, references to the Joint Proceedings have received a mixed reception in the courts. In the Inflation Restraint Act case, Mr. Justice O'Leary referred specifically to testimony by Robert Kaplan before the Committee and generally indicated that "statements made by Cabinet Ministers and legislators at or before the introduction of the Charter of Rights" might be admissible. He cited the Ontario Court of Appeal decision in Re Federal Republic of Germany and Rauca (1983), 145 D.L.R. (3d) 638, aff'g (1982), 141 D.L.R. (3d) 412 (Ont. H.C.) in which the Court had quoted testimony of the Deputy Minister of Justice. Chief Justice Deschênes (as he then was) looked at testimony before the Joint Committee in Quebec Association of Protestant School Boards v. Attorney General of Quebec (No. 2) (1982), 140 D.L.R. (3d) 33, aff'd (1983), 7 C.R.R. 139, aff'd (1984), 54 N.R. 196 (S.C.C.) (the Quebec Protestant School Boards case).

In Reference Re Minority Language Education Rights (1984), 47 O.R. (2d) 1, the Ontario Court of Appeal indicated that intervenants in that case had referred to submissions before the Joint Committee in reference to the mischief rule of statutory construction. The Court stated "[h]owever, it does not appear that reliance should be placed upon specific statements made in Parliament or in Committee as to what is contemplated, but rather the historical context of the new provisions". Ministerial statements made before the Joint Committee were held to have "dubious relevance" in Reference Re the Public Service Employees Relations Act, [1985] 2 W.W.R. 289 (Alta C.A.).

Despite the foregoing strictures, the Joint Proceedings transcripts will no doubt be referred to in the hope of elucidating the meaning and purpose of a particular provision in the Charter. Such references may establish only a background "flavour" and may not be persuasive when there is no other supporting evidence.

3. Statements from Hansard

This paper does not refer to Hansard. However, since it can be expected that litigants will do so, brief mention of its use is made here.

Jones v. A.G. for New Brunswick et al, [1975] 2 S.C.R. 182, Blaikie v. A.G. for Quebec (1978), 85 D.L.R. (3d) 352 (Que. S.C.), aff'd (1979), 95 D.L.R. (3d) 42 (Que. C.A.), aff'd [1979] 2 S.C.R. 1016 and Reference re: Authority of Parliament in Relation to the Upper House (The Senate Reference), [1980] 1 S.C.R. 54 made reference to the Quebec Resolution (Jones) and the Confederation Debates of 1865 (Blaikie and The Senate Reference). The use of legislative history in these cases, either for determining the constitutional status of provisions or their scope and meaning, appears to constitute a rejection of the usual rules against use of such material. It should be noted, however, that while legislative history may have been accepted (or as in Blaikie, not explicitly rejected) by the Supreme Court, the particular documents involved did have historical, rather than contemporary, status. Nevertheless, they were, of course, statements of politicians made contemporaneously with the passage of the legislation in issue and therefore may indicate that the same evidentiary value should be given to statements contemporaneous with the passage of the Charter.

In Reference re the Anti-Inflation Act, [1976] 2 S.C.R. 373, Mr. Justice Beetz referred to the contemporary speeches of politicians in Hansard as did Chief Justice Deschênes in the Quebec Protestant School Boards case.

Quotations from Hansard may serve to give the court a general view of the concerns relating to a particular provision. However, litigants should not expect great weight to be attached to them insofar as they may be self-serving and may have been quite irrelevant or in opposition to the final outcome.

Statements from legislative debates may be introduced to show "intent". However, it is difficult to attribute a single intent to a body composed of many individuals with many different reasons for agreeing to the same result. Thus there is limited utility in such statements (the question of intent is dicussed specifically in relation to constructive discrimination below at pp.257ff.).

4. Earlier Versions of the Charter

This paper makes some references to earlier versions of various provisions of the Charter. One reason for referring to the earlier version is to show that a right appears to have been expanded as the Charter evolved and therefore should be interpreted consistently with such expansion. Mr. Justice Lambert of the British Columbia Court of Appeal, in his dissent in Regina v. Konechny (1983), 6 D.L.R. (4th) 350, employed earlier versions of section 9 in order to interpret that section. He accepted that the earlier versions could be used as an aid to interpretation, specifically relying on the arguments put forward by Elliot on the subject which refer to Jones v. A.G. for New Brunswick, Blaikie and The Senate Reference, as discussed above (Elliot, 24 ff.).

C. The Application of the Charter

Section 32(1) of the Charter states

> This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The Charter may apply only to the legislative and executive* branches of government, both federal and provincial, in relation to all matters coming within the respective jurisdictions of the federal and provincial governments. However, certain types of government action and institutions may not be subject to the Charter; while on the other hand, some forms of private activity may be subject to the Charter. This portion of the introduction discusses the matter of the application of the Charter only briefly, for the purpose of bringing the issue to the attention of persons thinking of raising or defending Charter challenges with respect to the "gray" areas not clearly encompassed by the wording of section 32(1).

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* The Supreme Court has now specified that the Charter applies to Cabinet decisions: Operation Dismantle v. The Queen (May 9, unreported), aff'g (1983), 3 D.L.R. (4th) 193 (F.C.A.).

1. "Private" Activity

The first issue is whether the Charter applies to private activity at all*. In Regina v. Lerke (1984), 1 D.L.R. (4th) 185 (Alta. Q.B.), Rowbotham J. held that the Charter applies to private actors. He applied section 8 to a search of an accused by a supervisor of a tavern. The supervisor found marijuana in the accused's jacket and the accused was subsequently charged with possession of a narcotic. In support of his view, His Lordship cited an article by Professor Gibson which concludes that the Charter applies to private individuals. Gibson believes that section 32 merely makes it clear that the Charter applies to government. Furthermore, section 52 states that the Constitution is the supreme law of Canada (Gibson, "The Charter of Rights"). Since all persons are subject to the supreme law, Gibson concludes that the Charter applies both to public and private actors. Accordingly, Rowbotham J. upheld the trial judge's dismissal of the charge against the accused.

However, it is not clear that the Charter does apply directly to private actors**. But even if it applies only to public actors, private actors might still be subject to it under certain circumstances. Some assistance in this matter may be gained from the way in which American courts have dealt with it in the context of the American Bill of Rights*. In the United States, the Constitution applies only to government. However, "state action" and "state function" doctrines have been applied by American courts in order to bring private activity within the purview of the Constitution under certain circumstances. The "state action" doctrine refers to the state's involvement in some way in private activity. The "state function" doctrine refers to the performance by the private actor of some activity considered to be normally provided by the state. The application of these or similar doctrines in the Canadian context could result in subjecting to the Charter the following sorts of individuals or institutions: a private employer who receives government funding for job creation, thereby benefiting from government's involvement in the employer's activities; a private airline performing what is essentially a public service and subject to government regulation; and a hospital which serves the public, hospitals being "within the authority of the legislature in each province".

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* It should be noted that Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580 et al (1984), 10 D.L.R. (4th) 198 (B.C.C.A.) (leave to appeal to S.C.C. granted May 24, 1984) involved a private labour dispute. However, that aspect of the case was not considered by the Court because counsel for Dolphin Delivery abandoned his argument that the Charter did not apply to common law actions between private parties.

** The Charter would apply indirectly to private actors because legislation to which private actors are subject must conform to the Charter. There is also the question of whether the common law, also governing private actors, is subject to the Charter.

A small number of American cases is set out here in order to illustrate the state action and state function doctrines. The state action theory is illustrated by _Burton_ v. _Wilmington Parking Authority_, 365 U.S. 715 (1961). In that case, because a private restauranteur was a lessee of the Parking Authority, the discrimination he practised was subject to the equal protection clause of the 14th Amendment. The Supreme Court of the United States held that the Authority had made itself a party to the discrimination carried out by its lessee. State action has also been applied in segregation cases. For example, in Peterson v. City of Greenville, 373 U.S. 244 (1963), convictions of blacks who had disobeyed a city ordinance requiring segregation at lunch counters were not allowed to stand. The Supreme Court held that the judiciary had enforced the City's ordinance, thereby constituting state action. Thus while segregation in a private place of business could not be directly challenged under the Constitution, it could be indirectly challenged by attacking the convictions.

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* Cf. Rowbotham J. in _Lerke_: "In seeking an answer to the question of whether or not the Charter applies to the actions of private citizens, one against the other, the American Constitutional Law cases are unhelpful."

The state or public function approach was employed in Marsh v. Alabama, 326 U.S. 501 (1946). Marsh had distributed religious literature on the streets of a company-owned town against the company's regulations. Her conviction for trespass was upheld by the Court of Appeal, but was struck down by the Supreme Court of the United States. The Supreme Court held that a company-owned town, performing functions one would normally expect to be performed by a municipality, such as the provision of sidewalks, could not suppress free speech. Since Marsh would have been allowed to distribute the literature on public streets, she was also allowed to distribute it on the streets of the public company-owned town. Her conviction was overturned.

However, the state function doctrine was rejected in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) when the Supreme Court of the United States found that due process did not apply when the utility company cut off service. The majority held that the provision of electric power was not an obligation of the state being carried out by a private entity. Accordingly, the provision of electrical power did not clothe

the private entity with a public aura. The majority further found that because the state neither approved nor ordered the termination procedure, although it allowed it, it did not become a "partner or joint venturer in the enterprise". Marshall J., in his dissent, stated that the provision of electrical power was in fact a service which was traditionally identified with the state and therefore the public function doctrine should have applied, particularly since the public interest (of providing electrical power) is of such importance that the state "invariably either provides the service itself or permits private companies to act as state surrogates in providing it...." When a surrogate private company provides such a service, it will have to behave "in many ways like a government body". Douglas J., dissenting, was of the view that the utility company was exploiting its monopoly in its termination procedure and that the state allowed such exploitation; therefore, he considered that the state's "permissiveness or neutrality...[was] at war" with its supervisory function.

It should be noted that the American resort to the public state and public function doctrine was in part a consequence of the lack of alternative methods of enforcing equality in the private sphere at the time. In Canada, on the other hand, we have had the reverse experience: human rights legislation, developing for over forty years, is available to apply to private actors or to most activities which are not strictly a "matter within the authority of Parliament [or the provincial legislatures]" (Swinton, "Application of the Charter", 57).

Gibb J. (in Chambers) considered the impact of the American state action doctrine in Bhindi and London v. British Columbia Projectionists Local 348 of International Alliance of

Picture Machine Operators of the United States and Canada (June 11, 1985, unreported). The petitioners challenged under sections 2 and 7 of the Charter a provision in a union collective agreement which required movie projectionists to be members of the union as a precondition for employment.

Mr. Justice Gibb held that the Charter does not apply to private activity nor that "it was intended that freedom to contract would henceforth be limited by sections 2 and 7, such that a contract which adversely affects any right or freedom therein described of any individual, whether or not the individual is a party to the contract, is at risk of being declared of no force or effect at the instance of that individual". His Lordship specifically rejected the view expressed in Lerke.

He also rejected the submission that "as the union looks and acts like a government it should be regarded, under the Charter, as a government" because "the basic premise of resemblance does not exist". He went on to distinguish the experience in the United States giving rise to the state action doctrine from that in Canada, specifically with reference to the role of human rights legislation in Canada.

Finally, Gibb J. considered the submission that an exemption under the B.C. Labour Code permitting closed shop clauses was sufficient state action to bring the union membership requirement under the collective agreement within the purview of the Charter. The petitioners did not challenge the Labour Code itself and His Lordship stated that his rejection of their submission did not imply that the exemption provision could not itself be challenged.

It should be noted, too, that in Harrison v. Carswell

(1975), 62 D.L.R. (3d) 68, the Supreme Court of Canada held that although there was public access to a shopping mall, the mall was still private property and picketing there was trespassing. In Hudgens v. National Labor Relations Board, 424 U.S. 507 (1976), the Supreme Court of the United States came to the same decision.

The arguments supporting the view that the Charter applies to private action are less persuasive on the present wording of section 32(1) than they would have been on the earlier wording of "the Parliament and government of Canada and to all matters within the authority of Parliament" (with comparable wording in relation to the legislatures). That phrasing seemed to treat the jurisdictional reference as establishing a separate basis of application (Hogg, Canada Act, 78).

Private actors might be subject to the Charter if they are granted authority to act by legislation or bodies acting under legislation, pursuant to the "state action" doctrine. For example, Whyte argues that orders under the Ontario Human Rights Code, such as permitting discrimination in hiring someone to look after a child, might bring private actors under the Charter. He suggests that a person who had been denied employment on the basis of such discrimination could bring a claim under section 24 because the discrimination has been sanctioned by a government. He goes on to suggest that an action could also be brought against the private employer "on the basis that his or her conduct has become governmental conduct in that a governmental agency has ordained the conduct to be consonant with the government's policies": this is the "state action" approach. He notes that the problem with this approach is that if there had been no order at all there would be no basis for a complaint against the private employer under section 24 (Whyte, C/82-9).

A similar issue arises in relation to exemptions specifically granted by human rights legislation. If, for example, human rights legislation exempts from its prohibition against sex discrimination, the participation of persons of one sex on sports teams composed of members of the other sex, would the exemption be susceptible to challenge under the Charter? One argument is that once the legislature has created an exemption, the government has removed its presence from that particular area and therefore no activities relating to the exemption can be challenged. The opposite view is that the legislature has enacted a provision which generally prohibits discrimination but has then permitted some specific forms of discrimination; in permitting those forms of discrimination, the legislature itself has engaged in discriminatory activity. Far from removing itself from that sphere, it has condoned discrimination and therefore the exemption is susceptible to challenge. Then, private activity would be indirectly affected if the exemption were found to be unconstitutional.

2. "Government" Activity

The second issue is whether all government activity is subject to the Charter. There are activities or institutions which would seem on their face to be governmental, but the status of which in relation to the Charter is not clear. Two examples are crown corporations and administrative decision-making.

Some crown corporations may be said to perform important policy functions (the CBC might be said to enhance national unity, for example); others are expected to be highly accountable to Parliament or the legislature and may have their employees selected by a civil service commission. Other crown corporations are almost like private corporations, with little accountability to Parliament and with independent responsibility for their employees. The extent to which crown corporations are subject to the Charter may be determined by the extent to which they resemble their private counterparts: the more they do so, the less likely they are to be subject to the Charter. However, both private and public bodies are subject to human rights legislation.

Another issue insofar as the application of the Charter is concerned is whether it applies to administrative action. The argument against including administrative action within the jurisdiction of the Charter is that administrators are not members of the executive (Cabinet) or the legislature. However, a stronger argument may be that administrators are agents of the government; therefore, to deny individuals the right to challenge administrative action directly would permit the administration of the law to escape the strictures which the Charter imposes on lawmakers. Of course, one could challenge the legislation which the administrator is implementing but this can in some circumstances be unnecessarily artificial. Government is responsible for administration of its policies; in that sense, administrative action is government action. And as Swinton points out, and the cases confirm, the actions of police officers are clearly covered by the legal rights provisions (Swinton, "Application of the Charter", 52). Other people carrying out the law may well be, too. Further consideration of the status of administrative action is found in the discussion of "prescribed by law" below, at pp.166ff.

3. Examples in the "Gray" Area

Two examples of the many institutions which fall into the gray area of Charter application are universities and Indian band councils. Each of these is considered briefly to illustrate the factors which come into play in determining whether an entity would be subject to the Charter. These examples illustrate the ambiguity in section 32(2) which should be kept in mind in determining whether a claim has been validly brought under section 15.

Although universities are run by their Boards of Governors, they are established by legislation and receive government funding. They also serve a significant public function. Whyte points out that the source of the powers of universities in statutes does not distinguish them from "many other institutions which are clearly private institutions" (Whyte, C/82-9). Although Whyte does not name these private institutions, one thinks of private corporations; however, there may be doubt even about this (Hogg, Canada Act, 77). He suggests that under American jurisprudence, universities would be subject to the Constitution but that it is not clear that the same results would be reached under section 32 of the Charter.

> It would depend on whether the University could be said to be within the idea of the government of the province. If that phrase is used as a term of art to refer to the 'Government', that is the Cabinet Ministers and their officials together with agents of the Crown such as Crown Corporations, then presumably universities are not within the government of the province. If, however, the phrase is interpreted to include those institutions through which the province implements its public policies, then there probably is a sufficient connection between

> universities and the government to bring the former's conduct within the ambit of the Charter of Rights (Whyte, C/82-9).

Hogg states that "any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, Ministers, officials, municipalities, school boards, universities, administrative tribunals and police officers, is also bound by the Charter" (Hogg, Canada Act, 75, emphasis added).

Although band councils are intended to give some measure of self determination to Native peoples, they do receive funding from the federal government. Unlike universities, however, they are primarily internal organizations, rather than public ones. Insofar as the band councils perform functions ordinarily performed by governments, such as establishing a children's aid society or distributing social benefit payments, the state function theory may seem to be particularly appropriate. If the Charter does not apply to band councils, it would be possible for decisions made by such councils to discriminate against protected groups in respect of matters in which those same persons would have recourse to section 15 if they were not Natives.

There are no certain answers to these and similar questions. Anyone litigating under the Charter must look at the specific activity and assess it by reference to the kinds of variables which have been raised briefly above, along with other variables relevant to the specific case, to determine whether or not it is a proper matter for challenge pursuant to section 32(1) of the Charter.

D. Pre-Charter Protection of Civil Liberties

1. Parliamentary Sovereignty and The Division of Powers

The preamble to the British North America Act (The Constitution Act, 1867), refers to "a constitution similar in principle to that of the United Kingdom". This may be taken as importing to Canada several features of the constitution in the United Kingdom, among the most important of which is "parliamentary sovereignty"*. As conventionally interpreted in the United Kingdom, parliamentary sovereignty means that the legislature is "supreme in law", and the courts are therefore prevented from passing judgment on the validity of legislation.

Despite the incorporation into Canadian law of parliamentary supremacy, there is a history of judicial review of legislation in Canada. There are a number of historical reasons for this, but the principal one is that in Canada the sovereign legislative powers of the United Kingdom Parliament are divided between the provincial and federal governments. The courts have reviewed legislation in order to ensure conformity with the constitution's division of legislative powers; but they have not reviewed legislation in order to assess its wisdom or fairness or to ensure conformity with some higher or more "fundamental" law or principle (Strayer, p.3).

If, within their respective legislative spheres the Canadian legislatures are "sovereign", it is understandable that judicial review of legislation infringing civil liberties has come to be determined primarily in terms of the division of powers in the constitution. Consistent with the principles of federalism and parliamentary sovereignty, the courts have analyzed "equality" issues in terms of which government had the power to pass discriminatory legislation, rather than in terms of whether such discrimination should be prohibited altogether. The development of a theory of fundamental rights that may be asserted against the state could not easily develop in this setting.

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* For a fuller explanation of the concept of parliamentary sovereignty as it relates to the United Kingdom and to Canada, see Strayer and see Tarnopolsky, Bill of Rights.

This description over-simplifies the ways in which the courts dealt with civil liberties issues before the Charter (and with constitutional issues more generally). It suggests, for one thing, that a government's power to infringe civil liberties was easily determined by perusing the "heads" of power in sections 91 and 92 of the constitution. But the heads of legislative power do not appear to allocate the power to legislate with respect to civil liberties to either goverment. Characterizing legislation "affecting" civil liberties -- or "in relation to" civil liberties -- as falling within one of the heads of power in sections 91 and 92 of the constitution was by no means a mechanical task.

It should also be pointed out that the "division of powers" approach may have been used as a means of reconciling parliamentary sovereignty with judicial invalidation of legislation denying fundamental rights and freedoms. It has been suggested that in some cases the courts "did the right thing" (i.e. invalidated legislation infringing civil liberties) "for the wrong reason" (i.e. on the basis of the division of legislative powers in the constitution), and that they may very well have known what they were doing (Cotler, 127). But even if it is conceded that the division of powers approach was in some cases "a judicial expedient to reach a desired result in a given situation" (Lyon and Atkey, 375), this method of dealing with the "fundamental" rights of citizens obscured the real issues and proved unreliable as a method of safeguarding those rights. (Compare, for example, Union Colliery Co. Ltd. v. Bryden, [1899] A.C. 580 (P.C.) and Cunningham and A.G. B.C. v. Tomey Homma and A.G. Can., [1903] A.C. 151 (P.C.).)

Some cases suggested that the B.N.A. Act contained an "implied bill of rights" preventing the legislature from curtailing certain fundamental freedoms. For example, Rand J. (Kellock J. concurring) in Switzman v. Elbling, [1957] S.C.R. 285 said:

> freedom of discussion...is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence. As such an inherence in the individual it is embodied in his status of citizenship.

Abbott J. declared in this case that neither level of government could abrograte the right of free public debate.

Support for the "implied bill of rights" theory could be based on the preamble to the B.N.A. Act, referring to a "consitution similar in principle to that of the United Kingdom". This, it was argued, suggested not a simple notion of parliamentary sovereignty, but the incorporation into the Canadian constitution of a parliamentary democracy whose effective workings depend on the protection of certain fundamental rights and freedoms (Scott, 18-21).

However, in A.G. Canada v. Dupond, [1978] 2 S.C.R.

770, Beetz J., speaking for the majority of the Supreme Court of Canada, rejected the implied bill of rights theory with the statement that none of the fundamental freedoms listed in the Canadian Bill of Rights "is so enshrined in the Constitution as to be above the reach of competent legislation." On this basis, a Montreal by-law prohibiting street demonstrations for a period of thirty days was upheld as being in relation to "matters of a local and private nature within the Province." The majority did not characterize the by-law as legislation involving the fundamental freedoms of speech and assembly. Demonstrations, in Mr. Justice Beetz's view, were not a form of speech but a collective action "of the nature of a display of force rather than that of an appeal to reason." Chief Justice Laskin's dissent in Dupond, holding that the by-law invaded the federal criminal law power, illustrates how the "division of powers" analysis could have been used to invalidate the by-law in order to protect the fundamental rights of speech and assembly.

2. The Rule of Law

Canadian law has also inherited from the United Kingdom other principles which tend to favour individual rights as against state interests. These include general principles of statutory interpretation, such as the strict construction of penal statutes; and the more fundamental "rule of law", pursuant to which every official action must be authorized by law.

The rule of law has been described as a fundamental principle of human rights law:

> Within a State, rights must themselves be protected by law, and any disputes about them must not be resolved by the exercise of some arbitrary discretion, but must be consistently capable of being submitted for adjudication to a competent, impartial, and independent tribunal, applying procedures which will ensure full equality and fairness to all the parties, and determining the question in accordance with clear, specific, and pre-existing law, known and openly proclaimed (Sieghart, 18).

The "rule of law" implies, among other things, the even-handed operation of the legal system in its application and enforcement of the law: i.e., the traditional (Diceyan) view of "equality before the law." This procedural concept involves also the idea that officials have the same duty as citizens to obey the law, that rules granting powers to officials must be precise and that it is the duty of impartial courts to hold an equal balance between citizens and officials (Tarnopolsky, "Equality Rights", 400-401).

Roncarelli v. Duplessis, [1959] 1 S.C.R. 121 is perhaps the most frequently cited modern example of judicial application of this principle. In this case, Premier Duplessis ordered the cancellation of the plaintiff's liquor licence because he was a Jehovah's Witness who had assisted other Jehovah's Witnesses arrested for distributing their literature in breach of municipal by-laws. The Supreme Court of Canada held that the Premier's actions were "illegal" -- not authorized by law. The Premier had no statutory authority for his actions, and could not rely on his "discretionary" powers as Premier as justification for interfering with a citizen's rights.

Rand, J. held as follows in concluding that the

Premier could not cancel the plaintiff's liquor licence "at will":

> That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by the likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.

In addition to this traditional definition of the rule of law, another, more expansive definition has been put forward. In the same year that Roncarelli was decided, the International Commission of Jurists met at New Delhi and agreed upon certain enumerated rights which were thought to flow from the rule of law and according to which the legislature must:

(a) not discriminate in its laws in respect of individuals, classes of person, or minority groups on the ground of race, religion, sex or other such reasons not affording a proper basis for making a distinction between human beings, classes, or minorities;

(b) not interfere with freedom of religious belief and observance;

(c) not deny to the members of society the right to elected responsible Government;

(d) not place restrictions on freedom of speech, freedom of assembly or freedom of association;

(e) abstain from retroactive legislation;

(f) not impair the exercise of fundamental rights and freedoms of the individual; and

(g) provide procedural machinery ("Procedural Due Process") and safeguards whereby the above-mentioned freedoms are given effect and protected.

Variants of these rights find expression in international treaties, the Canadian Bill of Rights and the Canadian Charter. They all speak to the same issue, and affirm principles earlier expressed in the American Declaration of Independence and the French Declaration of the Rights of Man and of Citizens.

3. The Canadian Bill of Rights

The Canadian Bill of Rights is an ordinary statute of the federal Parliament, applicable only to federal laws. It can be repealed or amended by Parliament, and it expressly authorizes Parliament to exempt any statute from compliance with the Bill of Rights by including in the statute an express declaration of exemption.

Section 2 states what the effect of the Bill is to be on inconsistent federal statutes:

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or

> infringement of any of the rights or freedoms herein recognized and declared...

In only one case has the Supreme Court of Canada declared a statute inoperative as conflicting with the Bill of Rights. In R. v. Drybones, [1970] S.C.R. 282, section 94(b) of the Indian Act, making it an offence for an Indian to be intoxicated anywhere off a reserve, was held to be inconsistent with subsection 1(b) of the Bill of Rights guaranteeing every individual "equality before the law".

It is very difficult to reconcile the decision in Drybones with that given a few years later in A.G. Can. v. Lavell, [1974] S.C.R. 1349. Here, the Supreme Court held that para. 12(1)(b) of the Indian Act, which provided that an Indian woman lost band status by marrying a non-Indian man, did not contravene subs. 1(b) of the Bill of Rights. An Indian man did not lose band status by marrying a non-Indian woman. Mr. Justice Ritchie based his decision on what he took to be the meaning of "equality before the law" at the time the Bill of Rights was enacted (1960). The non-discrimination clause in the opening paragraph of the Bill was ignored and the egalitarian concept of equality exemplified by the Fourteenth Amendment of the U.S. Constitution was rejected. Instead, Mr. Justice Ritchie adopted Dicey's nineteenth-century definition of equality before the law: "equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land."

The analysis of the majority in Lavell has been subject to criticism on a number of grounds, including the argument that Dicey's definition of "equality before the law" ignores entirely the twentieth century concept of non-discrimination which had developed in the period since

World War II. This concept could have been used by the Court; indeed, the reference to non-discrimination in the opening paragraph of the Bill suggests by the ordinary rules of statutory interpretation that it should have been used (Tarnopolsky, Bill of Rights, p.159). However, it should be noted that in the Lavell situation the Native people themselves were divided on the equality issue, and had concerns about the preservation of descent in the male line. It is possible that this influenced the court somewhat.

There is no question that the Bill's language is vague and open-ended. This left to the courts a considerable task in interpreting its scope and effect. It has often been suggested that the restrictive interpretation given to the Bill is a result of the courts exercising "judicial restraint". Such an approach, it is said, is based on the view that the legislatures, and not the courts, should continue to bear ultimate responsibility for determining social policy (Hovius and Martin, p.354).

The role of democratically-elected bodies in preserving and protecting civil liberties is unquestionably important. And so-called "activist" courts may pose a threat to the basic democratic principle. Giving the judiciary the power to hold that validly enacted legislation is inoperative is contrary to the principle of parliamentary sovereignty and it may lead judges (who are not directly accountable to the public) to make decisions beyond both their institutional competence and their proper constitutional role.

The same value that argues for judicial "restraint", however, may also argue for the invalidation of legislation in certain circumstances. It should be noted that the "implied bill of rights" theory depended in part on the argument that a democratic form of government requires the protection of certain fundamental freedoms -- free and open political discussion and debate, for example. It can be argued more generally that the preservation of a democratic form of government is one of the values to which the Bill of Rights (and the Charter) speak. The integrity of the political process may be enhanced, rather than threatened, by judicial protection of certain "non-negotiable" rights.

The decision in Lavell was not merely (or perhaps at all) an exercise in judicial restraint. When faced with a civil liberties issue, the court must make a decision about the rights of an individual as against the state. In doing so, the court cannot avoid striking a balance between these two interests. If judicial restraint is evidenced by protecting state interests, and activism is evidenced by protecting individual rights, then the Supreme Court of Canada has been "restrained" in its interpretation of the Bill of Rights. If, however, judicial restraint includes the idea that the courts should not substitute their own values for that of the legislature, judicial interpretation of the Bill of Rights may not have been appropriately "restrained". As noted above, it has been argued that, far from following the usual principles of statutory construction in order to give effect to the "intent" of Parliament, Mr. Justice Ritchie's judgment in Lavell did the opposite: Parliament clearly did not "intend" the non-discrimination clause in the opening paragraph of s.1 to have no meaning (Tarnopolsky, "Equality Rights", 411).

4. The Impact of the Bill of Rights on the Charter

Section 52(1) of the Constitution Act, 1982 provides that the constitution of Canada, which includes the Canadian

Charter of Rights and Freedoms, is the supreme law of Canada. Any law inconsistent with the Charter is, to the extent of the inconsistency, of no force or effect. The recent decision of the Supreme Court of Canada in Hunter et al v. Southam Inc. demonstrates that the courts will use section 52(1) to invalidate legislation that conflicts with the fundamental rights and freedoms guaranteed in the Charter. (This case is discussed below, at pp.432ff.) With respect to these rights and freedoms, parliamentary sovereignty in the sense referred to above is no longer an overriding principle.

The "entrenchment" of certain rights in the constitution does not entirely deprive legislative bodies of their "sovereign" character. It does, however, further qualify the meaning of parliamentary sovereignty in Canadian law. "Thus while Parliament and Legislatures have legislative authority limited now by both the distribution of powers and the Charter guarantees of individual rights and freedoms, within the areas of authority left to each they enjoy parliamentary supremacy. This means that, like Westminster, they make laws which, if otherwise valid, the courts must respect" (Strayer, 44). So viewed, the entrenchment of rights in the Charter is merely an enlargement of the qualification of parliamentary sovereignty to which Canadian legislative bodies have always been subject: legislative activity must conform to the supreme law of the constitution. (The extent to which the principle of parliamentary sovereignty has been modified by the Charter is discussed below, at pp.108ff.)

The Charter's status derives from its inclusion in the Constitution. To the extent that the interpretation of the Bill of Rights can be explained in terms of its status as an "ordinary" federal statute, its interpretation should not govern Charter cases. Further, in some respects, the wording and structure of the Charter appears to reflect a conscious rejection of Bill of Rights jurisprudence. The equality rights in section 15(1), for example, appear to be structured in order to prevent the courts from adopting the Bill of Rights' restrictive definition of "equality before the law" (Tarnopolsky, "Equality Rights", 421).

In other instances, however, the language in the Bill of Rights and the language in the Charter are very similar. It had been suggested that, where such similarities in language exist, "Supreme Court of Canada rulings on Bill of Rights provisions be considered persuasive if not binding on lower courts interpreting similar provisions in the Charter" (Re Moore and The Queen (1984), 45 O.R. (2d) 3 (Ont. H.C.J.)). However, LeDain J., in comments which appear to have had the agreement of all members of the Supreme Court, stated in R. v. Therens (May 23, 1985, unreported) that similar wording in the Charter and Bill of Rights should not be presumed to import a similar interpretation into the Charter. The Courts were not granted under the Bill of Rights "a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament" while under the Charter they have been granted such a mandate (p.22).*

Furthermore, the Supreme Court of Canada has indicated that the Charter permits (perhaps requires) a "new start" with respect to the protection of fundamental rights and freedoms.

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* It should be noted that His Lordship went on to distinguish the particular right involved under the Charter (with respect to counsel) from that guaranteed under the Bill of Rights.

For example, in The Law Society of Upper Canada v. Skapinker, Mr. Justice Estey (speaking for the court) emphasized at p.367 the fact that the Charter is a part of the constitution -- "part of the fabric of Canadian law"; and that "[w]ith the Constitution Act, 1982 comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights..."*.

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* In Singh, et al v. Minister of Employment and Immigration (1985), 58 N.R. 1, Beetz J., Estey and McIntyre JJ. concurring emphasized that the Bill of Rights and provincial charter legislation should not be neglected (p.7). Indeed, the Charter and these quasi-constitutional, as Beetz J. called them, instruments "are susceptible of producing cumulative effects for the better protection of rights and freedoms". He decided the case under the Bill of Rights, rather than the Charter. However, the obvious and deliberate differences in the equality rights guaranteed under the Charter and the Bill of Rights make it highly unlikely that equality cases would be decided under the Bill of Rights instead of the Charter. Indeed, it should be emphasized that His Lordship did not say that the Bill of Rights can be used to limit the Charter, regardless of the rights involved, but rather that it has independent value.

E. Protection of Civil Liberties in Other Jurisdictions

1. International Law

Canada, with provincial consent, has acceded to the following human rights treaties: The International Covenant on Civil and Political Rights; The International Covenant on Economic, Social and Cultural Rights; The International Convention on the Elimination of All Forms of Racial Discrimination; and The Convention on the Elimination of All Forms of Discrimination Against Women. These conventions may be important in interpreting the Charter for three reasons: first, and most importantly, some consideration of the international conventions is warranted by the fact that in a number of cases, the courts have held that the Charter should be interpreted in light of Canada's international obligations (see, for example, R. v. Videoflicks). According to these cases, it is assumed that the framers of the Charter desired to give effect to these obligations, and the Charter should ordinarily be interpreted to give effect to this intention.

Secondly, to ignore the conventions in interpreting the Charter could lead to criticism of Canada for disregarding its international obligations. The United Nations Human Rights Committee has found instances of nonconformity in Canadian legislation in the past, the best known example being the Sandra Lovelace case, 2 H.R.L.J. 1981, 158, in which section 12(1) of the Indian Act was found to be incompatible with Articles 2(1), 3, 23(1) and 4, 26 and 27 of the International Covenant on Civil and Political Rights. An interpretation of the Charter consistent with Canada's international obligations will help to avoid any like finding in the future.

A third reason for using the conventions in interpreting the Charter is that some of the Charter's clauses appear to have been borrowed from international instruments. It may be argued that these clauses should not be interpreted more narrowly than they have been in the international instruments ratified by Canada. Since the Charter's rights and freedoms are stated in only the most general terms, the detail of some of the various specialized conventions to which Canada is a party can be of assistance in putting some content into these broadly-stated rights.

In addition to the conventions, there exists at the international level a complex set of influences, institutions and decision-making processes that contribute to the making of "law" in this area. In this body of "customary" international law respecting human rights -- a "constant and uniform usage, [is] accepted as law." Defining customary international law is a difficult task which depends on the establishment of the requisite state practice as shown by treaties, decisions of international and national courts, national legislation, diplomatic correspondence, opinions of national legal advisors, the practice of international organizations, policy statements, press releases, official manuals on legal questions and executive decisions and practices. It has been argued that the Universal Declaration of Human Rights is customary international law (Yearbook of the International Law Commission 1950, II, 368-372; Brownlie, 5).

Before examining some of the conventions that may be of particular importance to Charter interpretation, the legal relationship between international law and domestic law will be very briefly examined.

(a) The Relationship Between International Law and Domestic Law

(i) Customary International Law

As is discussed in the next section, rights or freedoms embodied in customary international law can become part of the law of Canada in the absence of conflicting statutes, common-law rules or constitutional provisions. By virtue of section 26 of the Charter all rights or freedoms existing in Canada continue to exist with the enactment of the Charter. Hence, any rights existing in customary international law which are not reflected in the Charter continue as part of the law of Canada, so long as they do not conflict with any statute or other domestic law.

There is also a presumption at common law that Parliament and the legislatures do not intend to act in breach of international law: statutes are to be interpreted as far as possible consistently with international law. It may be argued, therefore, that the rights and freedoms in the Charter should be construed as far as possible in conformity with customary international law (Cohen and Bayefsky, 280-1).

As noted above, however, customary international law is very difficult to define. The task of establishing the requisite state practice is only the first step in using customary international law in Charter cases. If it can be demonstrated that there *is* a rule of customary law, the court may then use it to "interpret" the provisions of the Charter. In the case of conflict or inconsistency between the Charter and customary international law, the former would govern (by virtue of both section 52(1) of the Constitution and the usual common law rule that customary international law is to give way to inconsistent domestic legislation).

(ii) Conventional International Law

In Canada, the ratification of treaties is a power of the federal executive. The treaties to which Canada is a party bind Canada internationally but in the absence of appropriate implementing legislation are not directly incorporated into Canadian law (Reference Re Tax on Foreign Legations, [1943] S.C.R. 208, [1943] 2 D.L.R. 481; Re Arrow River and Tributaries Slide & Boom Co. Limited, [1932] 2 D.L.R. 250; A.G. Can v. A.G. Ont (Labour Conventions case), [1937] 1 D.L.R. 673; Capital Cities Communications v. Canadian Radio-Television and Telecommunications Commission (1978), 81 D.L.R. (3d) 609; Ernewein v. Minister of Employment and Immigration, [1980] 1 S.C.R. 639 per Pigeon, J. (dissenting on another issue)). In signing an international convention, Canada does not choose to have the convention (as such) enforced in the courts, but rather chooses to bring its laws into conformity with its obligations either by amendment or by having its laws enforced (to the extent possible) in conformity with the convention.

By authority of the Labour Conventions case, treaty implementation in Canada is distributed between the federal government and the provinces. Although the Labour Conventions case has been subject to some judicial criticism, it is still good law (McDonald v. Vapour (1976), 66 D.L.R. (3d) (S.C.C.) 1 and Cohen and Bayefsky, 242-3). It would be very difficult to argue that the Charter directly implements the provisions of the international conventions. The Charter makes no express reference to Canada's international obligations. This may have been a purposeful exclusion to avoid any appearance of implementation. In McDonald v. Vapour, Laskin C.J.C. (speaking for four other members of the court) held that, even if Parliament had the power to pass legislation implementing a treaty or convention in relation to matters otherwise, for provincial legislation alone, "the exercise of that power must be manifested in the implementing legislation and not be left to inference. The Courts should be able to say, on the basis of an express declaration in the legislation, that it is implementing legislation...." There is no such express declaration in the Charter.

As in the case of unincorporated customary international law, however, unincorporated conventional law may still be important in terms of interpreting domestic law. As noted above, there is a presumption that Parliament and the legislatures do not intend to legislate in violation of Canada's treaty obligations. The impact of international human rights law is likely to be most significant in this regard.

It has been suggested that there must be some "ambiguity" in domestic law before resorting to an unimplemented convention for interpretation (Capital Cities Communications v. C.R.T.C.). This is unlikely to act as a barrier to the use of international conventions in interpreting the Charter. Many of the Charter's phrases are ambiguous and (as noted above) much of the Charter's language bears close resemblance to the language in the international conventions. However, if a provision in the Charter is truly unambiguous and inconsistent with a treaty, then clearly the Charter will prevail.

It should be noted that the law in this area deals with the relationship between statute law and international law. It does not deal with the relationship between constitutionally defined rights and freedoms and international law. It may be argued that this is an important distinction insofar as the legal principles assume that governments are able to amend their laws to conform to international obligations; or intend that "new" human rights obligations at the international level affect judicial interpretation of domestic law. This assumption may be more difficult to justify with respect to the constitution.

If Canada ratifies a human rights treaty after the Charter comes into effect, it may not be reasonable to assume that this indicates an intention to make any corresponding changes to the scope of Charter rights and freedoms -- either by formal constitutional amendment or by a change in the interpretation of the Charter by the courts. It may be argued that the Charter -- unlike ordinary statutes -- should not change its meaning according to the behaviour of governments at the international level. To the extent that the courts should give effect to the "intention" of the drafters of the Charter, the relevance of treaties ratified after the Charter came into force may be doubtful.

However, as has been suggested above, whatever the significance of treaties ratified after the coming into force of the Charter, those existing at the time the Charter was enacted may be of some assistance. It is easier to argue here that the drafters of the Charter "intended" that these international obligations be taken into account. All of the conventions discussed here were in force for Canada as of April 15, 1982. They were discussed during the debates which led to the adoption of the Charter, and recently, the Ontario Court of Appeal in R. v. Videoflicks has stated the following with respect to their relevance in Charter cases:

> In considering s.2 of the Charter one must keep in mind that the fundamental freedoms therein guaranteed have been somewhat more elaborately expressed than were the corresponding freedoms in the Canadian Bill of Rights. Both a textual comparison and a review of the evidence before the Special Joint Committee of the Senate and House of Commons on the Constitution, 1981-82, confirm that the International Covenant on Civil and Political Rights was an important source of the terms chosen. Since Canada ratified that Covenant in 1976, with the unanimous consent of the federal and provincial governments, the Covenant constitutes an obligation upon Canada under international law, by article 2 thereof, to implement its provisions within this country. Although our constitutional tradition is not that a ratified treaty is self-executing within our territory, but must be implemented by the domestic constitutional process (Attorney General for Canada v. Attorney General for Ontario (Labour Conventions Case), [1937] A.C. 326), nevertheless, unless the domestic law is clearly to the contrary, it should be interpreted in conformity with our international obligations.

It should be pointed out that most conventions contain a "most-favourable-to-the-individual" clause ensuring that an individual is not denied more favourable or extensive human rights protection otherwise available under national law or practice on the basis that the convention's protection is more limited. Even in the absence of such a clause, there is simply no basis for restricting our national standard to that arrived at in the international context, where the process of negotiation and compromise is even more difficult and complex than in a federal state.

International conventions to which Canada is not a party -- in particular, the European Convention of Human Rights

-- may also act as aids to interpretation. The textual similarities between the Convention and the Charter, and the similarities between the Canadian social setting and that in many of the countries in relation to which the Convention has been put into practice, may make the European Convention a valuable source of jurisprudence.

(b) A Review of the International Conventions

(i) Overview

By articles 55 and 56 of the United Nations Charter all members pledge to take joint and separate action in co-operation with the Organization for the achievement of universal respect for, and observance of, human rights and fundamental freedoms. A Human Rights Commission was established to prepare an "international bill of rights", resulting in the adoption in 1948 of The Universal Declaration of Human Rights.

The Declaration is not a legally binding instrument *as such*, but some of its provisions constitute general principles of law or represent elementary considerations of humanity. The Declaration combines political-civil and economic-social rights. Equality and freedom from discrimination are principal and recurrent themes. It declares the rights to life, liberty and security of the person, to fair legal process, freedom of conscience, thought, expression, association and privacy; the right to own property; the right to leave one's country and return to it; the right to work and to leisure, health care and education. It states that the will of the people is the basis of the authority of government and provides for universal suffrage. It also states that everyone has the right to a standard of living adequate for the well-being of himself and his family including food, clothing, housing, medical care and necessary social services. Article 2 states that: "Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Although owing much to eighteenth-century ideas of human rights (based on freedom and individual autonomy) the Declaration is very much a twentieth-century post-War document. The fundamental rights are not only political and civil in nature but also economic and social: rights of a kind that governments must actively provide or promote. The Declaration recognizes and affirms the welfare state.

The Declaration was never meant to stand on its own: it was to be "enacted" by the closest international analogy to legislation -- the conclusion of a multilateral convention. A "covenant" was thought to be necessary in order to anchor the rights and freedoms in international law and to place a _duty_ on the contracting parties to bring their laws and practices into accord with the rights and freedoms declared. By virtue of the principle _pacta sunt servanda_*, parties to a treaty not only give up their right to non-performance but also acquire a right to call the other parties to account for non-performance. The parties are required to report to the Human Rights Committee on their performance.

It took eighteen years to convert the Declaration into two conventions -- the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Cultural and Social Rights (ICECSR). These conventions had to bridge and accommodate "deep divisions and differences, especially between democratic-libertarian and socialist-revolutionary states -- differences in fundamental conceptions about the relation of society to the individual, about his rights and duties, about priorities and preferences among them" (Pechota, 10). In the meantime, the Universal Declaration has gained more legal significance than it was originally intended to have. It has become a standard of reference and a practical guide for UN organs whenever they deal with human rights issues. It is regarded by the Assembly as part of the "law of the United Nations". As mentioned above, an argument can be made that the Declaration is "customary" international law, adopted into Canadian law in the absence of conflicting domestic legislation.

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* This principle states that the agreements and stipulations of the parties to a contract must be observed.

The Western states fought for and obtained the division of the rights declared in the Universal Declaration into two separate Covenants. The United States was particularly instrumental in this regard, arguing that it would find it difficult to accept a treaty containing economic, social and cultural rights because these went beyond its constitution's guarantees and therefore were unenforceable by the courts. Canada, likewise, opposed a single Covenant on the basis that there was an essential difference between the two sets of rights, and that the Covenant should not contain rights that "might be regarded as advantages, either material or psychological, conferred upon the individual by a social system" and that "might properly be the subject of a declaration but not, in the existing state of international law, of an international instrument with legal force" (Pechota, 41). The socialist and most of the developing, countries opposed this division, arguing that human rights could not be so simply divided, nor could they be compared and classified according to their respective value. The resolution approving two covenants reaffirmed that "the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent" and that "when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man". The result of the division has been described as follows:

> In practical terms, the decision to prepare two instruments had both advantages and disadvantages. On the positive side, the separation made it possible to maintain the absolute character of civil and political rights and to strengthen their international implementation while encouraging a bolder approach than might otherwise have been feasible toward the formulation of economic, social, and cultural rights, notably by admitting that they could be implemented progressively. On the negative side, the division created uncertainty about the equal standing of the two categories of rights and led to duplication of a number of provisions in the covenants, raising problems of interpretation. However, the common ground and the identity of purpose, as well as the similarity of many provisions in the final drafts, make the covenants complementary and mutually reinforcing. The two covenants attained a normative unity as, together with other conventions adopted by the United Nations and its specialized agencies, they form a single body of new international law of human rights. (Pechota, 41-43)

As noted in the citation above, United Nations work in the area of human rights has by no means been restricted to the development of the ICECSR and ICCPR. Other conventions were adopted during the period in which these were being drafted;

and this standard-setting function of the United Nations has continued since the adoption of the Covenants. Of particular significance in defining non-discrimination rights are the International Covention on the Elimination of All Forms of Racial Discrimination (in force for Canada: Nov. 13th, 1970) and the Convention on the Elimination of All Forms of Discrimination Against Women (in force for Canada: Jan. 10th, 1982).

Consideration may also be given as well to the work of the International Labour Organization (I.L.O.). The I.L.O. is one of twelve Specialized Agencies brought into relationship with the United Nations under Articles 57 and 63 of the UN Charter. It has been particularly prolific in terms of adopting Conventions designed to protect economic and social rights. Canada is party to the following I.L.O. Conventions: (1) Convention Concerning the Freedom of Association (I.L.O.) No. 87 (in force for Canada: March 23rd, 1973); (2) Convention Concerning Equal Remuneration (I.L.O.) No. 100 (in force for Canada: Nov. 16th, 1973); (3) Convention Concerning Discrimination in Respect of Employment and Occupation (I.L.O.) No. 111 (in force for Canada: Nov. 26th, 1965); (4) Convention Concerning Employment Policy (I.L.O.) No. 122 (in force for Canada: Sept. 16th, 1957).

(ii) The International Covenant on Civil and Political Rights

Article 2 of the Covenant sets out the general obligations of a state party to "ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The *non-discrimination* clause is amplified by Article 3, which contains an undertaking to respect the principle of *equality of men and women* in the enjoyment of the rights secured. Article 2 provides that each state party shall take necessary measures to give effect to the rights recognized and to ensure that any person whose rights or freedoms have been violated has an effective *remedy* (and where possible a judicial remedy.)

Article 4 provides for *derogations* "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" to the extent "strictly required by the exigencies of the situation" so long as the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. No derogations are allowed with respect to Articles 6, 7, 8(1)(2), 11, 15, 16 and 18.

Part II of the Covenant (Articles 6-27) lists the rights protected:

Article 6. The right to life

7. Freedom from torture and inhuman treatment

8. Freedom from slavery and forced labour

9. Right to liberty and security

10. Rights of detained persons to be treated with humanity

11. Freedom from imprisonment for debt

12. Freedom of movement and choice of residence

13. Freedom of aliens from arbitrary expulsion

14. Right to a fair trial in civil and criminal proceedings
15. Protection against retroactivity of the criminal law
16. Right to recognition as a person before the law
17. Right to privacy
18. Freedom of thought, conscience and religion
19. Freedom of opinion and expression
20. Prohibition of propaganda for war and of incitement to national, racial or religious hatred
21. Right of assembly
22. Freedom of association
23. Right to marry and found a family
24. Rights of the child
25. Political Rights
26. Equality and non-discrimination rights
27. Rights of minorities

These rights mirror many of the rights guaranteed in the Canadian Charter. The Covenant, however, goes into somewhat more detail with respect to some of them. For example:

> The right to life is stated not to preclude the death penalty (subject to certain restrictions.)(Art.6).
>
> The rights of detained persons and prisoners (Art. 10) includes the obligation to separate adults from juveniles and to provide treatment aimed at reformation and social rehabilitation.

> The freedom of thought, conscience and religion (Art. 18) includes respect for the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.
>
> The individual's right to freedom of expression (Art 19) includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or in print, in the form of art or through any other media of his choice.
>
> The right to freedom of association (Art. 22) includes the right to form and join trade unions.

As was noted above, the Charter should, to the extent possible, be read consistently with these provisions, except where their application would narrow existing rights. It should also be kept in mind that some of these rights and freedoms are subject to specific restrictions and limitations in ICCPR. In interpreting the "reasonable limits" of a right or freedom under section 1 of the Charter, the grounds for limiting the same right or freedom set out in ICCPR may be of assistance. However, care should be taken to recognize that the balancing of diverse social and political interests at the U.N. may lead to restrictions on rights which are unacceptable in the context of the Canadian Charter.

The Charter does not make specific reference to some of the rights and freedoms set out in ICCPR. For example:

> The rights not to be subjected to arbitrary or unlawful interference with respect to privacy, family, home or correspondence (Art.17)
>
> The right of the family to protection; and the rights to marry and to found a family (Art. 17)

The rights of children to special protection (Art. 24)

The lack of any specific mention of these rights does not mean that they are outside the Charter's provisions. Some privacy rights, for example, may be within section 7 of the Charter and special protection and assistance for children may be required by section 15(1)'s prohibition of age discrimination.* If there is doubt as to whether the Charter includes rights such as these, an interpretation of the Charter consistent with Canada's international obligations could support an argument for their inclusion.

(iii) The International Covenant on Economic, Social and Cultural Rights

It would appear from Paragraph 1 of Article 2 that the Covenant on Economic, Social and Cultural Rights is meant to be progressively implemented; that is, it is a promotional convention. The Covenant contains the same non-discrimination clauses (Arts. 2(2) and (3)) as the Covenant on Civil and Political Rights; but Article 2(3) allows for discrimination against non-nationals in developing countries. There is no provision for derogations in a state of emergency. Article 4 allows for limitations on the rights provided "as determined by law only...so far as...compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

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* If children have special needs, laws which fail to take account of these needs by treating them in the same way as adults may have discriminatory effects. Special protection for children will also fall in many cases within section 15(2) of the Charter.

Part III contains a detailed list of rights:

Article 6. The right to work

7. The right to just and favourable conditions of work, including *inter alia* fair wages, equal pay for equal work and holidays with pay

8. The right to join trade unions, including the right to strike

9. The right to social security

10. Protection of the family, including special assistance for mothers and children

11. The right to an adequate standard of living, including adequate food, clothing and housing and the continuous improvement of living conditions

12. The right to the highest attainable standard of physical and mental health

13. The right to education, primary education being compulsory and free for all, and secondary and higher education generally accessible to all

14. The right to participate in cultural life and enjoy the benefits of scientific progress

Whereas the rights in the Civil and Political Covenant are stated in terms of "Everyone has a right to..." or "No one shall be subjected to...", the normative articles of ICECSR state that "The States Parties recognize the right to..." or "The States Parties undertake to ensure..." The Covenant sets out standards which the contracting parties pledge themselves to secure progressively and to the extent possible given the constraint of limited resources.

Unlike ICCPR, the rights listed in ICECSR are not directly comparable to the rights in the Charter. As will be argued below (pp.196ff.), the Charter is not primarily an economic rights document. But the division between socio-economic rights and civil-political rights is not always easy to make. The right to form a trade union, for example, may be seen as one aspect of the "civil-political" freedom of association or as a right more properly characterized as "economic". In fact, it appears in both Covenants. The formation of trade unions is a means by which individuals may advance toward a substantive welfare goal. There will often be this kind of overlap because civil and political rights define the ways in which decisions affecting an individual's economic, social and cultural welfare must be made. "Process" rights and rights to some substantive result respecting the distribution of economic, social and cultural "goods" are closely connected.

By adhering to ICECSR, Canada has undertaken to secure (progressively) the rights guaranteed. Canada has, therefore, recognized the importance of these particular rights not merely as desirable goals, but as "rights which derive from the inherent dignity of the human person." (See the Preamble to ICECSR. The same Preamble accompanies the list of rights in ICCPR.) There is not, however, any mechanism in domestic law by which an individual can claim against the government for failing to take steps to secure the kind of rights listed in ICECSR. An unemployed person cannot, for example, bring an action based on the "right to work" guaranteed in Article 6 of ICECSR. However, a person who is unemployed because he has been forced to retire at an age prescribed by legislation may be able to use Article 6 of ICECSR in support of a Charter claim that mandatory retirement constitutes discrimination on the basis of age contrary to section 15(1) of the Charter.

In assessing whether or not such a policy constitutes a "reasonable limit" under section 1 of the Charter, the court may have regard to the fact that the individual interest affected by the policy is the "right to work", a right that Canada has recognized as part of the "inherent dignity of the human person". More generally, insofar as government action challenged under the Charter impedes or assists in the securing of the rights listed in ICECSR, it may be correspondingly more or less difficult to defend as a reasonable limit under section 1 of the Charter. In the context of section 15(1), particular distinctions based on a prohibited ground may be more difficult to defend if they adversely affect an individual's rights with respect to work, social security, education, health care or any other ICECSR right. ICECSR cannot be used as a basis for asserting welfare rights, or as a basis for reading them into the Charter; but it may be used as an indication of the importance of the individual interest affected by government action that is otherwise open to challenge by the Charter's provisions.

(iv) The European Convention on Human Rights

Canada cannot, of course, adhere to the European Convention since it is a regional treaty. The use of the Convention in the interpretation of the Charter may, however, prove to be significant. There are many similarities between the legal, political and social systems of Canada and the Western European states who are parties to the Convention. This is particularly significant since section 1 of the Charter invites comparisons with other free and democratic societies. The Convention not only covers the same kinds of rights and freedoms as are guaranteed in the Charter, but also uses many of the same phrases and expressions.

Like ICCPR, the European Convention contains a general *non-discrimination* clause (Article 14); a provision respecting the need for effective *remedies* before a national authority (Article 13); and a provision for *derogations* in times of war or public emergency (Article 15). And like ICCPR, some of the Convention's rights and freedoms contain specific restrictions and limitations within them. The Convention guarantees the following rights and freedoms:

Article 2-5: The right to life, liberty and security of person

6-7: Legal rights in civil and criminal proceedings

8: The right to respect for privacy, family life, home and correspondence

9: Freedom of thought, conscience and religion

10: Freedom of expression

11: Freedom of peaceful assembly and association, including the right to form and join trade unions.

12: The right to marry and found a family

The Protocols to the Convention add the right to peaceful enjoyment of possessions, (P1,s.1) the right to education, (P1,s.2) democratic rights (P1,s.3) and mobility rights (P4,s.2).

The Convention also establishes a permanent Commission and Court of Human Rights. The Commission may receive petitions from any individual or association claiming to be the victim of a violation by a State Party of the rights set forth in the Convention. The Commission has the power to investigate and report or to refer cases to the Court. The Court's judgments are final and the States Parties agree to abide by its decisions. (The competence of the Commission and the jurisdiction of the Court depends on recognition by the States Parties.) There is now a substantial body of jurisprudence interpreting the provisions of the Conventions. This jurisprudence may be of assistance in interpreting some of the Charter's provisions.

(v) Further Examples of the Use of the Conventions in Interpreting Section 1 and Section 15(1) of the Charter

(1) Limitations on Rights

As noted above, ICCPR and EHR contain a general derogation provision for war or emergency. Under ICCPR (Art. 4(1)) a derogation may not be made if it involves "discrimination solely on the ground of race, colour, sex, language, religion or social origin". These instruments also contain specific provisions in various individual Articles which specify the limitations and restrictions that may be allowed with respect to that particular right or freedom. These provisions (in most cases) require that the limitation be:

(1) prescribed by law (see below pp.166-168).

(2) objectively justified (usually "necessary" and, in some cases, necessary "in a free and democratic society").

(3) Justified on specific grounds such as national security, public safety, public order, the prevention of disorder, the prevention of crime, public health, public

> morals and the protection of the rights and freedoms of others.

Limitations of this kind apply to the freedoms of movement, assembly, association, opinion, expression, conscience and religion; and to the rights of trade unions. They apply as well to the rights to property, privacy and a fair trial.

The non-discrimination clauses are not subject to any such express limitations or restriction. They are not, however, absolute. In the Belgian Linguistic Case, 1 E.H.R.R. 252, the European Court held that the principle of equality of treatment guaranteed by Article 14 of the European Convention is violated if a distinction made on a prohibited ground has no "objective and reasonable" justification, or if it is established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized. It should be noted that this is an interpretation of the scope of the non-discrimination right. It is not an interpretation of an express limitation clause.

The question of whether the non-discrimination clause in section 15(1) of the Charter should be similarly interpreted, and the relationship between section 15(1) and the general limitation clause in section 1 of the Charter, are considered below (at pp.228ff. and pp.117ff., respectively).

(2) Equality Rights

The meaning of the phrases "equal before the law" and "equal protection of the law" in Article 26 of ICCPR may be better understood by reference to the preparatory work of the

Human Rights Committee in drafting the Article. The authors of the United Kingdom Report to the Committee had interpreted the phrase "equal before the law" in terms of Dicey's concept of equality before the law as part of "the rule of law"; that is, equality before the courts. In discussion, it was pointed out that Article 26 referred also to the general "egalitarian" concept of "equal protection of the law" in the sense of non-discrimination. Further, it was agreed that the prevention of discrimination required "active protection" against discrimination and not merely passive measures of prevention. "Equal protection of the law" was added to Article 26 following this discussion.

It should be noted as well that Article 14 of ICCPR provides that "All persons shall be equal before the courts and tribunals." The Charter does not contain any reference to equality before the law other than that in section 15(1). If the Charter does guarantee equality before the courts in the procedural sense referred to above it must be found in section 15(1) or by reference to the "rule of law" in the Preamble. (This issue is discussed below at pp.235ff.)

(3) Non-enumerated Grounds

The list of grounds of discrimination in ICCPR and in the European Convention are not meant to be exhaustive. In both cases, the list is preceded by the words "such as" (Art. 2(2) of ICECSR, by contrast, appears to use a closed list of grounds). Some of the grounds referred to in these Conventions are not explicitly referred to in the Charter. These are: political or other opinion, social origin, property, birth or other status, and association with a national minority. Because the Charter's list of grounds appears to be open, it may be possible for an individual to argue that some of these grounds should be recognized under the Charter as well. (Non-enumerated grounds of discrimination in the Charter are discussed below at pp.317ff.)

(4) Specialized Conventions

With respect to discrimination based on race or sex, and discrimination in the area of employment or education, the specialized conventions may be consulted: in particular, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the ILO Convention concerning Discrimination in Respect of Employment and Occupation (ILO 111) and UNESCO's Convention against Discrimination in Education. Two things should be noted about these conventions:

> (1) Both CERD (Art. 1(4)) and CEDAW (Art. 4) explicitly provide for special measures or affirmative action to ensure de facto equality between racial groups and men and women.
>
> This is consistent with the view of the Human Rights Committee in drafting Article 26 of ICCPR. The Committee was of the view that affirmative action in favour of a disadvantaged group was not to be considered discrimination. Rather: it was considered to be sometimes essential to avoid discrimination (Ramcharan, 254-262).
>
> (2) In the case of all the specialized conventions referred to above, discrimination is defined in terms of "effects". (Art.1(1) of CERD defines discrimination as "any distinction...based on race...which has the purpose or effect of nullifying or impairing the...enjoyment or

> exercise...of human rights and fundamental freedoms....") Article 1 of CEDAW is in substantially the same terms: "discrimination" is defined in terms of purpose or effect. ILO 111 and the Convention against Discrimination in Education define discrimination in similar terms; but omit reference to the purpose of the distinction and refer only to its effect in impairing equality of treatment.
>
> This emphasis on the effect of a distinction is consistent with the view taken by the Human Rights Committee in the Case of the Mauritian Women. The Committee held that there did not have to be direct discrimination against women in order to violate Article 26 of ICCPR. In the Belgian Linguistic Case, the European Court held that a measure which appears to conform with the requirements of an Article enshrining a particular right or freedom may still infringe that Article if its effect is discriminatory, in violation of Article 14 of the Convention.

These interpretations argue against the view that section 15(2) of the Charter should be viewed as an "exception" to the non-discrimination principle. Section 15(2) can be viewed not as authorizing "reverse discrimination" (or discrimination in favour of a disadvantaged minority), but rather as recognizing that it is sometimes necessary to treat disadvantaged individuals or groups differently (more favourably) in order to achieve, in effect, some measure of equality of opportunity. They also argue in favour of an interpretation of section 15(1) that includes protection against "constructive discrimination"; or discrimination that is not based on intention to discriminate or a direct classification on a prohibited ground. The emphasis should be on whether the legislation, although expressed in non-discriminatory terms, has the effect of differentiating people on a prohibited ground. (Constructive discrimination is discussed below at pp.256ff.)

Further reference to international conventions and jurisprudence is made throughout this paper. As stated above, these may be useful as aids to interpretation, but they are not in any sense determinative of the scope and effect of the Charter's provisions.

2. U.S. Bill of Rights

American courts have already considered many of the difficult questions that will arise under the Charter. As a result, American jurisprudence offers what often appears to be ready-made answers to the delimitation of Charter rights. Even if the answers are not accepted by our courts, the analysis employed by American courts offers a way of viewing problems -- a way of elaborating and putting content into textually vague terms in particular situations. Further, court opinions in the United States are supplemented by a large body of academic writing displaying a high level of theoretical sophistication and analytical abstraction. This is often intellectually compelling in its own right and offer a philosophical perspective within which to view court decisions.*

Having said this, the argument for the adoption of American constitutional approaches can easily be over-played.

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* See, for example, A. Bickel, The Least Dangerous Branch (1962); John Rawls, A Theory of Justice (1971); R. Dworkin, Taking Rights Seriously (1971); L. Tribe, American Constitutional Law (1978); J.H. Ely, Democracy and Distrust (1980); R. Nozick, Anarchy State and Utopia (1974); R. Berger, Government by Judiciary (1977).

Although no one would argue for its wholesale adoption, the cultural specificity of the entire body of American law is often overlooked. With respect to the issues of "equality" and "discrimination", for example, American constitutional law has been overwhelmingly concerned with racial inequality and racial discrimination. American courts have used the "equal protection" clause of the Fourteenth Amendment to define the equality rights of the black minority -- a group whose inferior social, political and economic status made it the first recognized and most important "discreet and insular minority". The anti-discrimination principle has been extrapolated to other forms of inequality, but racial inequality is the prototype against which the existence and importance of all other forms are judged.

So viewed, American constitutional law has both advantages and disadvantages for interpreting the Charter. It offers an opportunity to view the historical development of legal principles respecting discrimination in a "clear case" such as racial discrimination by government. However, the equality provisions of the Charter will not be used primarily for purposes of assessing legislation that, on its face, discriminates on the basis of race. This is not because the problem of racial discrimination has disappeared, but because the focus of the problem has changed. For the most part, racial discrimination will be dealt with through provincial human rights legislation (governing private activity) and through affirmative action programs.

We should be particularly careful in borrowing American remedies in constitutional cases. Desegregating schools, for example, required American courts to develop some innovative remedies, in part because state and local officials were unwilling to accept Supreme Court decisions with respect to what "equality" meant. The recalcitrance of public officials merely reflected a more widespread public hostility to the values espoused by the Court. This hostility was itself the product of a deep and long-standing rift in American society. Unless experience shows that we are dealing with a similar problem in Canada, less intrusive kinds of remedies may be workable and preferred, by both the judiciary and the government*.

In other instances, American courts have structured remedies as they have either because of a lack of central (or state) organization or because of the seeming lack of alternatives. In each case, before assuming that these remedies are a necessary consequence of a finding of a Charter violation, we should look carefully at the availability of other and better ways of curing the problem. We have a body of law respecting remedies. Section 24 of the Charter invites us to use it. In particular, we should hesitate to give over to judges the task of directly and personally revising public institutions.

Insofar as American constitutional law has developed a system of dealing with forms of discrimination other than race, it may be of value in interpreting the Charter. In every case, however, it will be necessary to decide whether the ways in which general principles respecting discrimination have been elaborated in American Courts make sense in our social and political context. The text of the Charter will require different results in some cases, and will permit different results in others. Our standards should be our own.

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* On structural injunctions, see below, pp.422-423.

Interpreting the Charter on its own may also allow for a more straightforward analytical approach than if we attempt to borrow from American decisions. One problem faced by American judges that is not a problem for judges interpreting the Charter is how to make an eighteenth-century constitutional text respond effectively to current social conditions. Simply because the Charter is new, some difficulties of application are not nearly so acute as those faced by American courts. Our courts will have to deal, however, with the problem of constitutional "growth" -- with the problems of maintaining fidelity to the text and some semblance of continuity while allowing for change. In this respect, the successes and failures of American constitutional law will be instructive.

The Charter differs from the American constitution in significant ways: not the least of which is the inclusion of section 1 in the Charter to guide the courts in the difficult and sensitive task of balancing interests. Although it is probably true to say that the courts would not treat the rights in the Charter as absolute even in the absence of a section 1, the inclusion of section 1 responds to at least four issues that might otherwise be more problematic: first, it does set out the standard to be applied to all the rights and freedoms, albeit a vague one; second, it suggests that the standard of review is to be the same for the infringement of all rights and for discrimination on all grounds protected by section 15; third, it establishes that the onus is on the government*; and fourth (related to the third point), it makes it clear that the doctrine of parliamentary supremacy is not wholly to restrict the courts, a point emphasized by the removal of the phrase "with a parliamentary system of government" after the words "in a free and democratic society" from an early version of section 1.

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* For a contrary view, see McLeod, Takach, Morton and Segal, 4-44 where it is suggested that the onus may be on the applicant with repsect to certain alleged infringements (such as section 8) but not with respect to others.

A further distinction from the U.S. Bill of Rights is that section 15 enumerates specific protected grounds (although the wording is a clear indication that this is not intended to be an exhaustive list) while the American Bill of Rights does not specify any grounds. The American caselaw has been very much concerned with this issue. Historically, the core concern of the equal protection clause was the protection of blacks from at least some forms of discriminatory political decisions (Berger, Government, 20-51; Bickel, 56-59), but the general language suggests an intention to include other forms of discrimination as well. As a result, much of the equal protection analysis in the United States has centred on the question of how to distinguish those forms of discrimination included in the general language of the equal protection clause from those which are not. Two of the factors involved have included the historical treatment of a specific group and the importance of the rights at stake.

One significant difference in this area is that the Charter has entrenched sexual equality, a markedly different approach than the American rejection of the Equal Rights Amendment. It was the treatment of sex discrimination by the U.S. Supreme Court which motivated various groups, including the Canadian Human Rights Commission, and members of the Joint Committee of the House of Commons and the Senate, to seek an explicit statement of sexual equality beyond that in section 15.

Thus while the American jurisprudence may be a valuable "aid to interpretation", it must also be assessed in light of the difference in the two countries' political, social and legal history, and the difference between the text of the Charter and the text of the U.S. Bill of Rights.

F. Social, Political, Cultural and Economic Factors in Relation to an Analysis of the Charter: The Use of Extrinsic Aids

Pre-Charter constitutional cases dealing with division of powers involved the use of material which was not strictly legal in nature but which could be characterized as sociological or economic. It is expected that even greater use of such material will be made under the Charter. In division of power cases, the primary purpose for using such materials is to determine the "pith and substance" or subject matter of the legislation in issue, although they are also used to determine the effect of legislation. Under the Charter, the use of such materials will go beyond determining what the nature of the impugned legislation is and will more extensively go to the question of effect (*R.* v. *Videoflicks*).

An example of materials permitted to be filed in pre-Charter cases is found in the decision of the Supreme Court of Canada in the *Anti-Inflation Act Reference*. In that case, the court permitted the parties to file a variety of material including the federal government's White Paper entitled "Attack on Inflation", monthly bulletins of Statistics Canada, a study by Professor Lipsey dealing with the harm caused by inflation and various policy options to deal with inflation, telegrams from economists supporting that analysis, a critique of the Lipsey study, and a transcript of a speech delivered by the Governor of the Bank of Canada. These materials were admitted in relation to whether or not the *Anti-Inflation Act* came within the "Peace, Order and Good Government" clause in section 91 of the *British North America Act* and were "relevant to a consideration of the social and economic circumstances under which the Act was passed, the evils with which the *Anti-Inflation Act* purported to deal, and the likely effectiveness or otherwise of the Act in accomplishing its alleged purpose" (Laskin, 7). Similarly, in the Reference re Ontario Residential Tenancies Act, [1981] 1 S.C.R. 714, Mr. Justice Dickson (as he then was) stated that materials which are relevant to the issues before the court and which are not inherently unreliable or which do not offend against public policy should be admissible for such purposes, but that such materials are not to be available as an aid in statutory construction. The principles enunciated by Mr. Justice Dickson in Residential Tenancies were applied by Mr. Justice McIntyre, for the Supreme Court of Canada, in Churchill Falls (Labrador) Corporation Ltd., et al v. Attorney-General of Newfoundland, et al (1984), 8 D.L.R. (4th) 1. Mr. Justice McIntyre admitted into evidence, among other items, a government pamphlet outlining the government's reason for enacting the legislation at issue.

Although there are strong arguments and strong judicial statements in favour of the extension of the use of such materials, the view expressed by the Supreme Court of Canada in The Law Society of Upper Canada v. Skapinker, suggested that the Court had not wholeheartedly accepted the use of extrinsic materials. In that case the court took a cautious view of the use of historical materials relating to the development and incorporation of section 6 of the Charter. Estey J., for the Court, cited the comments by that Court in the Senate Reference approving of the consideration of historical background. However, as he had "not found it necessary to take recourse to it in construing s. 6...[, he did] not wish to be taken in this appeal as determining one way or the other, the propriety in the constitutional interpretative process of the admission of such material to the record"(p.382). Thus Skapinker itself cannot be interpreted as disapproving or approving of the use of these broadly based extrinsic aids.

However, in Big M Drug Mart, Dickson J. (as he then was) interpreted Skapinker as a more positive statement in favour of considering the context of the Charter, stating at p.524 that Skapinker illustrated that "the Charter was not enacted in a vaccuum, and must therefore...be placed in its proper linguistic, philosophic and historical contexts".

The Ontario Court of Appeal has stated more extensively this view that the Charter must be treated as part of the general historical and current Canadian environment and subject to the influences of that environment. MacKinnon A.C.J.O. stated in Re Southam Inc. and The Queen (No. 1) (1983), 41 O.R. (2d) 113 (C.A.) (accessibility to juvenile trials case) that the Charter "should not be stultified by narrow technical literal interpretation without regard to its background and purpose; ...." Other significant cases have also approved the extended use of "non-legal" materials. In the Reference re Minority Language Educational Rights, the Ontario Court of Appeal said that the Charter has

> changed the focus of constitutional law and the role of the courts. We believe that the Court's concern for these rights requires a move away from narrow and strict constructionalism toward a broader approach, which would include a consideration of the historical developments, particularly in the field of education.

The Court went on:

> We see no reason not to include in our consideration of the general historical background of the matter, relevant political, economic, social and cultural developments. Such considerations may

> serve to broaden our approach to the issue at hand, and to avoid resort to strict legal principles of interpretation.

The Court then devoted over eighteen pages of its judgment to a survey of the history of minority language education rights in Ontario. Tarnopolsky J.A., in R. v. Videoflicks et al, accepted this approach, stating "that the overall historical context preceding the entrenchment of s. 57 [sic] is relevant as an aid in interpreting the meaning of this or any other provision in the Charter". Writing for the Ontario Court of Appeal, he explained that the usual approach to constitutional law which involves the determination of the purpose of legislation, has a continued but more limited applicability to Charter cases:

> Regardless of whether the courts have, with respect to the determination of the distribution of powers and the characterization of laws in relation thereto, looked to "intent" or "effect" or to both..., in my view the interpretation of the Charter necessarily requires an assessment of the "effect" of impugned legislation...While a law may have a legitimate purpose, its actual operation may result in the infringement of rights and freedoms guaranteed by the Charter.*

The Court did consider the "character" of the Retail

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* In Big M Drug Mart, Dickson J., speaking for the majority of the Supreme Court and Madame Justice Wilson, in her concurring reasons, confirmed that the effect of legislation is to be considered in Charter cases. They differed only with respect to whether the Court should assess the purpose prior to the effect. The Chief Justice was of the view that purpose should be considered first. (See pp.513 and 536 for the views of the majority and of Wilson J., respectively.)

Business Holidays Act and determined that it was enacted for a secular, not religious, purpose. However, in Mr. Justice Tarnopolsky's view, to have ended the matter there would have avoided the real issue of whether Charter rights had been infringed. An understanding of the purpose of the legislation is only a partial understanding; for its effect might be quite at odds with the purpose, resulting in a contravention of the Charter. Tarnopolsky J.A. found that even though the statute had a secular purpose, it had the effect of limiting the expression of religious belief.

The development of a general understanding of the Charter's purposes or role involves at least a brief consideration of the (various) purposes of the individual sections in order to answer the following sorts of questions: why is this right guaranteed by the Charter? in what way is this right associated with the legislation or administrative practices being challenged? is the loss of this right in the circumstances too great to bear in light of the reason for its inclusion in the Charter? We cannot answer these and similar questions if we fail to search beneath the literal wording of any given section. For example, even the Supreme Court's decision in Skapinker, despite Estey J.'s reluctance to endorse the practice of considering such materials, included some consideration of the purpose of section 6(2)(b) which unavoidably involved some concern (admittedly in this judgment minimal) with the broader questions of the political and economic implications of Canadian citizenship and the requirements of federalism, an approach explicitly approved by the same Court in Big M Drug Mart.

Professor Hogg suggests that the Brandeis Brief (comprised of social science data) may be the only efficient way to bring such facts before the court and that constitutional facts need not be proved as strictly as adjudicative facts (Hogg, "Proof of Facts"). Adjudicative facts are those specific to the case; for example, in R. v. Videoflicks, the Crown had to prove that the persons charged had opened their businesses on Sunday and that they did not satisfy the exemption under the legislation. Constitutional facts are "background" information; in R. v. Videoflicks, the constitutional facts included the economic impact of closing two days a week, the importance of religion in maintaining cultural identity and so on. Although the Brandeis Brief may be usefully employed to summarize a variety of studies (as it did in Brown v. Board of Education, 374 U.S. 483 (1954) in order to show the effects of segregation), it must be remembered that it is not subject to cross-examination nor introduced as sworn testimony. However, such concerns are of less importance in relation to constitutional facts than they are in relation to adjudicative facts.

Of all the Charter's provisions, section 1, more than the others, suggests this assessment of purpose and history. It can be difficult to show that an infringement is justifiable, nor can we appreciate the ramifications of the limitation imposed on the right or freedom beyond the immediate case, unless we know why the right was guaranteed in the first place. A defence under section 1 "invites courts to examine the traditions and conventions of Canadians to assist them in deciding what limits are reasonable" (Mackay, 63).

However, although section 1 in particular suggests the use of extrinsic materials in order to determine whether or not the limit is reasonable, other sections of the Charter will require the same kind of analysis. For example, section 6 refers to "the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged", section 15(2) uses similar terminology and section 27 contains the phrase "the preservation and enhancement of the multicultural heritage of Canadians". Such provisions suggest that the court will assess external data relevant to the determination of whether individuals are disadvantaged or the determination of the nature of the multicultural heritage of Canadians. Thus the Charter appears to invite the use of social and economic evidence to an even greater extent than even the most recent pre-Charter constitutional cases.

The Constitution is an invitation to the courts to reach decisions against a background contemporaneous with the making of the decision, to recognize a changing social and political equilibrium. The Charter is not a static document; it is meant to evolve over time. The Supreme Court of Canada has expressly adopted the "living tree" image of the Constitution, including the Charter, in Hunter v. Southam Inc.(pp.156-157). Professor Gibson captures the interaction of these forces in his expression "judicial statesmanship":

> By 'statesmanship' is meant an appreciation by the court of the effect each of its constitutional interpretations will have on the way life is lived in Canada...An understanding of the priorities Canadians have historically assigned to various social, political and economic values is imperative but so is a willingness to abandon traditional solutions which have ceased to serve the nation's long-term needs....(Gibson, "Interpretation", 27-28)

In brief, then, underlying this analysis is the assumption that interpretation of the Charter requires the courts (and those who are trying to respond to the Charter legislatively) "to go outside the four corners of the written constitutional mandate in order to fulfill it" (Fairley, 229).

G. Section 15 Reflects the Principles of the Charter as a Whole

The Charter is comprised of a set of principles, which are manifested in the broadly-phrased rights and freedoms it guarantees. Accordingly, some understanding of the sections other than section 15 will help to enhance an understanding of section 15 itself. Section 15 to some degree culls its meaning from the other rights and freedoms which surround it. Each of the provisions is in a broad sense interrelated with the others. In Big M Drug Mart, Chief Justice Dickson proposed that the purpose of a particular right or freedom is to be found in part by reference "to the meaning and purpose of the other specific rights and freedoms with which it is associated" and "by reference to the character and the larger objects of the Charter itself" (p.524).

What follows is not meant to be an exhaustive statement of all the issues arising out of the various sections but is merely meant to highlight those aspects which are related to section 15 and to the Charter's general principles. Various rights and freedoms are first considered. These are divided into the minority "collective" rights (sections 16-21, 22, 25 and 27) and the individual rights (sections 2, 3, 6 and 7). There is then a discussion of a set of provisions concerned with the relationship between the legislature and the judiciary (sections 24, 33 and 52).

1. The Rights and Freedoms Guaranteed by the Charter

In brief, the rights and freedoms guaranteed by the Charter enhance individualism and opportunity for individual action free from state proscription (for example, freedom of assembly) or protection from the state (for example, the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice).* They also promote to some extent a form of national identity -- one that involves the recognition of diverse collective identities. The Charter defines the Canadian democratic character as one that encourages both individual _and_ collective action, an interaction that will at times be a source of conflict (for one person's right will often be another's deprivation), but will also provide the strongest barrier to overwhelming state and majority power. That the threat is seen as mutual, however, is evident in government's reservation of some power quite free from any interference, should it choose, through section 33. However, it should be remembered that section 33 can be invoked only in regard to section 2 and sections 7 to 15.

As will be discussed later in the paper, one view holds that the predominant tone of the Charter is legal and political; it will likely affect economic conditions or status only indirectly. Thus, on this view, another characteristic of the rights would be that they are political and legal, not explicitly economic. This does not mean that individuals would not be able to make claims in relation to economic matters, but that economic matters without unequal treatment or disproportionate impact on a prohibited ground do not appear to fall within Charter guarantees.

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* Mention should be made of the fact that the difference in language between "rights" and "freedoms" has been judicially noted. In the Divisional Court decision in the _Inflation Restraint Act_ case, for example, Mr. Justice Galligan (dissenting, no comment by the majority on this point) defined "right" as involving "an interest or capacity which if not directly conferred by law is at least recognized by, implied by or supported by law". He defined "freedom" as "the absence of any legal restraint or constraint". He thus concluded in the context of that case that workers at common law had the freedom to strike but not the right to do so. This view implies a distinction between a positive claim to something substantive and a negative claim not to have certain activities interfered with by government; or put another way, there is a difference between a claim to be provided with something and a claim to be unencumbered.

(a) "Collective" or Minority Rights

The minority language rights accrue to groups and in that sense are "collective" rights. In addition, the recognition of multicultural and aboriginal concerns are also based on the "collectivity", as is section 35 of the Constitution which affirms aboriginal rights but is not part of the Charter. These rights and the protection of these interests illustrate the Charter's purpose of protecting minorities against the dominance of the majority, whether it be the language of the majority, the cultural practices of the majority, or the denial by the majority of self-identification by the minority.

In the Quebec Protestant School Boards case, Chief Justice Deschênes concluded that the language rights, which have the characteristics of both collective and individual rights, are nevertheless individual rights, primarily because section 24 is a remedy accruing to an individual. However, he considered the aboriginal rights to be "a clear case of collective rights". In one important respect, the aboriginal "rights" are properly collective: they constitute for native peoples because they are native peoples a set of rights or claims over and above rights and claims accruing to them as citizens and residents of Canada. In the sense that the language, multicultural and aboriginal rights do refer to specifically defined entities (and educational language rights depend on numbers) and do import some sense of community, they can be distinguished from the fundamental and other similar rights which are clearly individual rights with no reference point in a specific group or community. Section 15 in part refers to collective rights, because the anti-discrimination right accrues from perceived or actual membership in a group, and in part refers to individual rights, because section 15 establishes the rights in reference to the individual.

Sections 16-21 and 23 and sections 22 and 27 specifically deal with bilingualism/culturalism* and multilingualism/culturalism, respectively. The treatment of French-English language rights is notably different from the treatment of multi-culturalism.

The minority language rights represent a constitutional commitment to the historical and legal assertion of a distinct and superior status for French and English as the official languages of Canada and of New Brunswick. Russell contends that the language provisions "express the pan-Canadian nationalism which, at the level of ideology, is the counter to the nationalism of Quebec separatism" (Russell, 38-40). These sections, perhaps especially the minority language educational rights of section 23, are intended to emphasize the dualism of Canada; this is different from a bilingual country in the fullest sense. Although the Charter goes as far as to establish a positive obligation to provide for the continuation of minority language areas throughout Canada, it does very little, and probably cannot do much, to encourage the development of personal bilingualism.

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* Biculturalism is not explicitly protected by the Charter. However, the preservation of culture is heavily tied to language.

The multilingual/cultural rights, on the other hand, are treated less extensively. Section 22 does maintain the legal or customary rights (whatever they may be) of languages other than French and English. Section 27, which is intended to preserve and enhance the multicultural heritage of Canada, is an interpretive section against which all other sections are to be assessed. It does not actually guarantee any rights, although this does not mean it will not have a significant impact on existing social conditions. Section 27 of the Charter can be contrasted with section 27 of the International Covenant on Civil and Political Rights which reads:

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such a minority shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their religion, or to use their own language.

Section 27 was not included in the first two drafts of the Charter, but was added after several witnesses raised the matter before the Joint Committee (Joint Proceedings, 22:81, 23:21). Opposition to the entrenchment of multiculturalism arose from a concern that the provinces would have difficulty responding to the demands for "particular cultural image[s] reflected in the school curriculum, in teaching rights, etc., etc., etc." (Joint Proceedings, 34:97). It has been suggested that "section 27 was included as a result of a strong lobbying effort in the winter of 1980-81 when it appeared that the Charter might well reach private conduct" (Whyte, C/82-11).

In R. v. Videoflicks, Mr. Justice Tarnopolsky considered the origin of section 27, specifically the development of an official policy of multiculturalism. He interpreted freedom of religion in light of section 27 of the Charter:

> Therefore, my conclusion that a law infringes freedom of religion, if it makes it more difficult and more costly to practise one's religion, is supported by the fact that such a law does not help to preserve and certainly does not serve to enhance or promote that part of one's culture which is religiously based. Section 27 determines that ours will be an open and pluralistic society which must accommodate the small inconveniences that might occur where different religious practices are recognized as permissible exceptions to otherwise justifiable homogeneous requirements.

Mr. Justice Dickson also commented on the close interaction between religious freedom and the preservation and enhancement of our multicultural heritage in Big M Drug Mart (p.519).

Section 27 is an explicit recognition of the "mosaic" character of Canada, an assertion of no little import when it is applied to acceptance of differences implicit in notions of equality. Whatever their actual impact, section 27 and the language provisions are an attempt to define the complex Canadian "national character" as one diffused with differences, yet committed to some basic ("fundamental") political freedoms and legal rights. Note that sections 16-23 and 27 cannot be overridden by section 33.

An indication of the relationship between bilingual rights and multicultural rights can be seen in the limitation of section 23 rights to citizens and to certain citizens. A citizen whose first language is Italian, German, Chinese or any other language than English or French and who received his or her public schooling outside Canada has no rights under subsection 23(1). Non-citizens whose first child was educated in English or French can make no claim for their other children as a result of subsection 23(2). This is important because recent immigrants, even if they take out citizenship, cannot have their children educated in the language of the linguistic minority. This point is perhaps most relevant to Quebec where there was a prospect of most immigrants having their children educated in English rather than French. The Supreme Court of Canada referred to this point several times in the Quebec Protestant School Boards case (see, for example, p.215).

Aboriginal rights are referred to in section 25 of the Charter and in section 35 of the Constitution (which is not part of the Charter). The according of "special treatment" to the aboriginal peoples of Canada is an important reflection of the special and distinct status of these peoples in the history of Canada. However, the current provisions have not been considered satisfactory by Native peoples. The wording of section 25 is merely interpretive rather than a guarantee. However, section 35 does constitutionalize rights and, since it lies outside the Charter, it is not subject to restriction through section 1. On the other hand, the enforcement provisions of section 24 do not apply to section 35; nor does it contain its own enforcement provision. Section 52 does apply to section 35.

The inclusion of sections 25, 35 and 37 (which provided for a constitutional conference on aboriginal rights) were intended to ensure that patriation of the Constitution would not end the debate on aboriginal rights. These sections give constitutional recognition to existing aboriginal and treaty rights and provide mechanisms for further identification of those rights. Since the passing of the Constitution Act, 1982, there has been one amendment. In addition to providing for further constitutional conferences at which aboriginal rights are to be considered, it amends sections 25 and 35.

Section 25(b) referred to the inclusion of "any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement" among the aboriginal, treaty or other rights protected by section 25. It now includes among those rights "any rights or freedoms that now exist by way of land claims agreements or may be so acquired". Thus, the right is not limited to future settlements, but includes existing ones with the result that they are not subject to the guarantees in the Charter.

Section 35(1) stated prior to the amendment that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". This subsection has now been clarified; "'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired". This amendment also gives constitutional status to land claim agreements already reached between governments and the aboriginal peoples. The significance of this constitutional recognition in section 35 is that the agreements may not be overriden by legislation.

The principal issues involve the extent to which aboriginal peoples have special rights in relation to land and the question of entitlement to membership in bands and the rights accruing to such membership. This last is an important issue, in part because it involves the constitutionality of the removal of Indian status from Indian women who marry non-Indian men, now provided for by section 12(1)(b) of the Indian Act. Whether the same provision could be made by band councils themselves is uncertain (see discussion of relationship between sections 25 and 28 below at pp.384-385).

(b) Individual Rights

Many of the other rights and freedoms in the Charter are intended to assert the individual's claim of autonomy in relation to the state. This is especially true of the fundamental freedoms and legal rights but also applies to other rights as well.

This analysis is grounded in the assumption that the Charter does more than clarify the existence of rights already enjoyed; rather it guarantees rights and freedoms which we as individuals could not enforce before despite the Bill of Rights and the "implied Bill of Rights theory". Thus in stating that section 2 "is mainly declaratory of the freedoms which have long existed in Canada", the Ontario Divisional Court in Re Ontario Film Board and Video Appreciation Society and Ontario Board of Censors (1983), 147 D.L.R. (3d) 58, aff'd (1984), 45 O.R. (2d) 80 (C.A.) (no comment on this point), may not have accurately reflected the significance of Dupond which treated freedom of expression and civil liberties generally, in relation only to the continuing struggle of jurisdictional power. Outside the question of jurisdiction there was no basis for an enforceable claim that freedom of expression or assembly, or any other civil rights, ought not to be infringed.

The Charter sets out for the first time a set of basic democratic rights and freedoms which a person in Canada can insist on by virtue of her or his status qua individual; and it establishes a mechanism by which claims can be asserted against a government -- federal or provincial -- which denies or limits them. For the first time, these rights and freedoms definitely exist outside the boundary of inter-jurisdictional disputes and can be enforced.

However, in another sense the rights may be said to have been existent but only now can be independently enforced. This appears to be the view expressed by the Supreme Court at p.211 of the Quebec Protestant School Boards case when the Court distinguishes section 23 of the Charter, which guarantees minority language educational rights, from other rights and freedoms guaranteed by charters and similar instruments:

> It is not a codification of essential, pre-existing and more or less universal rights that are being confirmed and perhaps clarified, extended or amended, and which, most importantly, are being given a new primacy and inviolability by their entrenchment in the supreme law of the land. (Emphasis added.)

(i) Illustration 1: Conscience and Religion

Section 2 of the Bill of Rights refers only to "freedom of religion". It seems likely that the inclusion of the word "conscience" in the Charter indicates an intention that the clause cover beliefs that we might not otherwise think of as "religious". The simplest explanation for including "conscience" together with "religion" is that this ensures that atheists and agnostics are guaranteed a right not to be religious in the traditional sense -- a right not to belong to any established religion and not to profess any theistic belief (Hogg, Canada Act, 15). In R. v. Videoflicks, Mr. Justice

Tarnopolsky described the scope of "freedom of conscience in the following terms:

> ...the freedom protected in s. 2(a) would not appear to be the mere decision of any individual on any particular occasion to act or not act in a certain way. To warrant constitutional protection, the behaviour or practice in question would have to be based upon a set of beliefs by which one feels bound to conduct most, if not all, of one's voluntary actions.

The First Amendment of the American constitution contains both a free exercise clause and an anti-establishment clause. By the anti-establishment clause, the state is required to be neutral as between religions and to maintain what is sometimes referred to as a "wall of separation" between church and state. These two clauses do not always live happily together. The free exercise of particular religions may require aid or assistance or some special consideration from the state, but this assistance may seem to violate the anti-establishment clause (Tribe, 813-819).

The situation is different in Canada. Not only is there no anti-establishment clause in the Canadian Charter, but section 29 preserves the rights of denominational, separate or dissentient schools (guaranteed in section 93 of the Constitution). Furthermore, the Charter's Preamble states that "Canada is founded upon principles that recognize the supremacy of God". And historically, the "separation of church and state has never been an avowed policy of Canadian legislators...." (Cotler, 201)

In dealing with religion under the Charter, the courts not only have to define the scope of religious freedom (and its limits), but as well they must also deal with claims of discrimination based on religion under section 15(1) while at the same time preserving the rights of denominational schools, adhering to principles recognizing the supremacy of God and guaranteeing freedom of conscience.

In Big M Drug Mart Ltd., Dickson J. (as he then was), writing the majority reasons, defined freedom of religion broadly. In addition to the right to express one's beliefs through worship and teaching, he stated that infringement of freedom of religion could arise not only from direct means of control but from "indirect forms of control which determine or limit alternative courses of conduct available to others":

> In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the State, translates them into a positive law binding upon believers and non-believers alike. Theological content of the legislation remains as a subtle and constant reminder to religious minorities within the Country of their differences with, and alienation from, the dominant religious culture. (p.518)

His Lordship further stated at pp.529-530 that:

> [T]he guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others. The element of religious compulsion is perhaps somewhat more difficult to perceive (especially for those whose beliefs are being enforced) when, as here, it is non-action rather than action that is being decreed, but in my view

> compulsion is nevertheless what it amounts to.
>
> ...[The Charter] mandates that the legislative preservation of a Sunday day of rest should be secular, the diversity of belief and non-belief, the diverse socio-cultural backgrounds of Canadians make it constitutionally incompetent for the federal Parliament to provide legislative preference for any one religion at the expense of those of another religious persuasion.

The decision of the Ontario Court of Appeal in R. v. Videoflicks indicates as well that section 2(a) protection may be claimed if the effect of an otherwise valid law makes it more difficult or costly for an individual to observe or practise his religious beliefs or to follow conduct that is demanded by his conscience. That case, which appears to involve a "constitutional exemption" referred to by Dickson J. in Big M Drug Mart, is also to be decided by the Supreme Court.

(ii) Illustration 2: The Other Fundamental Freedoms

The principal significance of the fundamental freedoms is that they are a major way of differentiating democratic systems from totalitarian systems. Compared to the "Democratic Rights" which are political rights narrowly defined, the fundamental freedoms have political implications in a broader sense, containing as they do the seeds of dissent and confrontation. Freedom of conscience and religion is less obviously "political", but religious belief and practice may serve as a focal point for dissent (for example, as justification for not paying taxes, not serving in the military or not adhering to rules established by the Milk Board: all these challenge the authority of the state).

The fundamental freedoms are the freedoms which permit individuals to confront governments and minorities to challenge majorities. Yet they, unlike the "democratic rights", are subject to the override.

If there is a significant distinction between "freedom" and "right", as suggested by Mr. Justice Galligan (see above, p.89n.), then the fundamental freedoms actually set out realms of free action by Canadians, rather than providing the basis for a claim that government must provide something. However, it is hard to avoid the conclusion that section 2 does guarantee a right to express an opinion, a right to gather with like-minded people and a right to practice one's religion. The distinction between "right" and "freedom" is not a perfectly clear one.

The fundamental freedoms also serve to increase access to the political process. Mr. Justice Berger (as he then was) appreciated the importance of recognizing that not everyone has the same access to the political decision-makers. He noted the failure of the Supreme Court in Dupond to appreciate that reality of political life and to refuse to categorize "assembly" as a form of speech:

> Speeches may be -- and usually are -- given at demonstrations. Leaflets are given out to passers by. These are time-honoured forms of the exercise of freedom of speech in Canada. Assemblies, parades and gatherings are often the only means that those without access to the media may have to bring their grievance to the attention of the public. Not every cause reaches the columns of The Globe and Mail or Le Devoir.

(Berger, Fragile Freedoms, 187)

The fundamental freedoms allow people to acquire information and to disseminate it, to express their views and to act in concert*. All those actions (and the right to vote) are means by which people can influence the political process and thereby advance toward "equality" or prevent loss of whatever equality they might already enjoy. Through their assertion of political rights (that is, through their exercise of political equality), they may enhance their economic or social status. Note, though, that "equality" rights as implicit in fundamental freedoms are different from those under section 15 in that the latter are related to discrimination on the basis of a group characteristic while the invalidation of an infringement of a fundamental freedom does not hinge on a finding of discrimination. Furthermore, as referred to above, there may be a difference inherent in the labelling of "fundamental freedoms" and "equality rights": the latter appear to require government to act positively to provide the right, whereas fundamental freedoms appear to require government to refrain from action. However, the obverse of the government's refraining from action is that the individual will have the opportunity (or right) to make a speech or to gather people together.

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* A more restrictive view of the right to act in concert is maintained by the majority of the Alberta Court of Appeal in Reference Re Public Service Employees Relations Act. The nature of the action appears to be important from their view (for example, whether it is judged to be "harmful"). However, there appears to be no acceptable or principled way to distinguish among different actions set out in the judgment.

(iii) Illustration 3: Legal Rights

Section 7 illustrates the difficulties in interpreting ambiguous Charter provisions. While included under the arguably narrow heading of "Legal Rights", section 7 potentially could have broad application. Theoretically, it could permit the courts to recognize the rights of property and privacy, both of which have been asserted as integral to the "liberty and security of the person" and both of which have already had a chequered history in the evolution of the Charter (Joint Proceedings, 41:16). Both the right to property and the right to privacy were explicitly included in the original draft of the Charter (Elliot, 14).

Property rights could include the right to a livelihood or to an income, for example; they could involve challenges to zoning laws, monopolies, labour legislation and so on. However, the availability of section 7 to provide a basis for substantive economic rights must be examined in relation to the Charter as a whole. (This question is considered below at pp.196ff.)

A right to privacy could cover all matters relating to reproduction and sexuality. In R. v. Morgentaler, Smoling and Scott (1984), 47 O.R. (2d) 353 (decision on appeal to C.A. reserved), Mr Justice Parker suggested that "certain elements of the right to privacy may be protected by section 7 of the Charter. The decision to marry and to have children might be granted constitutional protection because they are considered deeply rooted in our traditions, and fundamental to our way of life". The same is not true of abortion, in his view.

However, since section 7 was included under "Legal Rights" and not "Fundamental Freedoms", it is open to the courts to interpret it narrowly. In Skapinker, Mr. Justice Estey gave a clue that section 7 will be interpreted narrowly when he said that the heading "Legal Rights" merely states the obvious (p.377). This dictum suggests that the section 7 rights will be treated as similar to the legal rights in the other sections under the heading. However, Madame Justice Wilson, in her concurring judgment in Operation Dismantle, stated at p.54 that it was not necessary to accept a "restrictive" interpretation of section 7 which would limit it to protection against arbitrary arrest or detention. Mr. Justice Parker in Morgentaler found that section 7 does not have to be read as if restricted to the rights enumerated in sections 8-14, but nevertheless also found that the heading "Legal Rights" had some significance. Section 7, he said, is a legal right, not a fundamental freedom. Consideration should, however, be given to the fact that in testimony before the Joint Committee, Robert Kaplan, substituting for the Minister of Justice, stated that section 7 would permit the addition of legal rights beyond those currently listed. However, he did not indicate whether the additional rights would be of a kind with those in sections 8-14.

It could be argued that section 7 includes a guarantee of "substantive due process". Barry Strayer, Assistant Deputy Minister in the Department of Justice (now Mr. Justice Strayer of the Federal Court), testified, however, that "it was our belief that the words 'fundamental justice' would cover the same thing as what is called procedural due process... [I]t...does not cover...substantive due process..." (Joint Proceedings, 46:32, 3:78). A proposed amendment to change "fundamental justice" to "natural justice" was defeated; however, the defeat was probably due in part to the fact that the amendment would have added other rights to section 7 (Joint Proceedings, 46:34).

To date the Courts have taken a mixed view of whether section 7 guarantees substantive due process. The Manitoba courts appear to have taken the position that section 7 guarantees only procedural fairness. In Regina v. Hayden (1983), 8 C.C.C. (3d) 33 (leave to appeal to Supreme Court of Canada denied December 19, 1983), the Manitoba Court of Appeal held that section 7 was not available to review the intoxication provisions of the Indian Act but found that the relevant section, section 97(b), contravened section 1(b) of the Bill of Rights. Hall J.A., for the Court, expressed concern about an expansive view of section 7:

> To hold otherwise would require all legislative enactments creating offences to be submitted to the test of whether they offend the principles of fundamental justice. In other words, the policy of the law as determined by the Legislature would be measured against judicial policy of what offends fundamental justice. In terms of procedural fairness, that is an acceptable area for judicial review but it should not, in my view, be extended to consider the substance of the offence created.

The Manitoba Court of Appeal also affirmed the decision of the Court of Queen's Bench in Re Balderstone et al and The Queen (1982), 2 C.C.C. (3d) 37; aff'd 10 W.C.B.313 (Man. C.A.) (leave to appeal to the Supreme Court denied Dec. 15, 1983) that the decision of the Attorney General to prefer an indictment after an accused has been discharged at the preliminary inquiry does not contravene section 7. The Court held that there is no relevant substantive change to the status of the preliminary inquiry to be found in section 7, which the Court held is restricted to procedural fairness. In Re Jamieson and The Queen (1982), 70 C.C.C. (2d) 430, a Quebec Superior Court judge upheld provisions of the Criminal Code and the Identification of Criminals Act requiring attendance of the accused for fingerprinting. Durand J. stated

> It appears to be established now that the effect of this section is procedural and not substantive in that it may be used to impugn the form of an infringement of the guaranteed rights but not the substance thereof.

However, other courts have found that section 7 provides substantive, as well as procedural guarantees. R.L. Crain Inc. v. Couture et al (1983), 6 D.L.R. (4th) 478 (Sask. Q.B.) dealt with the constitutional validity of section 17 of the Combines Investigation Act, which authorized a member of the Restrictive Trade Practices Commission to order the examination of a person on oath and to order the production of documents. Section 17 was held to be inconsistent with section 7 of the Charter because it compelled a person to assist in his own prosecution. Sections 11(c) and 13 were not applicable because the person under investigation had not been charged with an offence. The Court stated

> If the phrase "principles of fundamental justice" merely contemplates procedural review, then legislation is open to attack only on the ground that the procedure prescribed or adopted for the achievement of certain policies falls below a minimum acceptable standard as being indispensable for the enjoyment of life, liberty and security of the person. On the other hand, if the phrase contemplates substantive review, then legislation is also open to attack on the ground that the policies are in themselves incompatible with the enjoyment of such rights.

Scheibel J. then considered the treatment of "due process" and "principles of fundamental justice" under the Bill of Rights, noted the reluctance of Laskin J. (as he then was) in Curr v. The Queen (1972), 7 C.C.C. (2d) 181 (S.C.C.) to interpret due process as including substantive due process because of the statutory nature of the Bill of Rights, and referred to the caselaw (but not to Regina v. Hayden). He concluded that section 7 "should not be interpreted as limiting the courts to a review of procedural matters. Rather, it has opened the door to a review of the substance of legislation that interferes with a person's right to life, liberty and security of the person".

The British Columbia Court of Appeal also found that section 7 guarantees substantive review. It struck down section 94(2) of the B.C. Motor Vehicle Act which imposes strict liability on a person who drives while his licence is suspended in Reference re Section 94(2) of the Motor Vehicle Act (B.C.), [1983] 3 W.W.R. 756 (on appeal to S.C.C.). The B.C. Court of Appeal based its interpretation of section 7 on section 52 "which can be viewed as effecting a fundamental change in the role of the courts". Specifically, this change is that there is no longer a presumption of legislative validity in relation to Constitutional cases involving the operation of section 52.

In R. v. Young (1984), 46 O.R. (2d) 520, the Ontario Court of Appeal quoted with apparent approval commentators who have suggested that substantive content can be read into section 7. However, in deciding the case, the Court seemed to rely on the doctrine of abuse of process. It should be noted that R. v. Young is not itself concerned with the substance of legislation but with procedure, the "fairness" of the laying of charges under the circumstances of the case. As such, it is not clear that R. v. Young can stand as strong authority for the proposition that section 7 applies to substantive due process if that is defined as being concerned with the content of laws.

2. The Modification of the Principle of Parliamentary Sovereignty

The Charter's apparent transfer of power from legislators to judiciary has concerned many critics. Three factors appear to be at work here: one is fear (on the part of the legislators) of loss of responsibility; the second is the related fear of what restrictions on governmental discretion enforceable rights may entail (a concern of the executive); the third is the opinion that the judges are not equipped to carry out the mandate delivered to them in the Charter, both because they are not trained to do so and because they are not accountable to the public. In relation to the last, for example, ex-Premier Blakeney of Saskatchewan expressed concern with the courts' deciding questions such as "abortion ...sectarian education...Sunday observance, restraints on racist associations or religious cults...." He argued that "the final accommodation of competing values" should not be the responsibility of persons who "have no special abilities in relation to these most difficult of political choices and who are not politically accountable to the people for their decisions" (cited in Fairley, 231; emphasis in Fairley).

One way in which the Charter is intended to protect minority rights is through the complementary interaction of legislature and judiciary. The Charter establishes this "complementary interaction" by extending judicial power -- but not transferring all power to the courts -- and by narrowing legislative power -- but not removing all effective power from the legislatures. Through section 52's declaration of the supremacy of the constitution, the courts acquire the power to assess other law against the supreme law and the power to declare inconsistent laws of no force and effect. It should be noted that the Courts have always had this power. In Reference re Section 23 of the Manitoba Act, 1870, and Section 133 of the Constitution Act, 1867 (June 13, 1985, unreported), the Supreme Court of Canada stated that

> Section 52 of the Constitution Act, 1982 does not alter the principles which have provided the foundation for judicial review over the years. In a case where constitutional manner and form requirements have not been complied with, the consequence of such non-compliance continues to be invalidity. The words "of no force or effect" mean that a law thus inconsistent with the Constitution has no force or effect because it is invalid. (p.30)

It would seem that while the Courts must strike down inconsistent provisions, they will not rewrite legislation to conform to the Charter (Hunter v. Southam). They will give guidelines for amending legislation, but it is unlikely that they will amend it themselves (Videoflicks).

In practice there will likely be a fine line between MacKinnon A.C.J.A.'s caution in Re Southam Inc. and The Queen (No. 1) (public access to juvenile trials case), that the presumption of legislative validity principle does not apply to Charter cases, and the observation of Galligan J. in the Inflation Restraint Act case that:

> duly enacted legislation...must be regarded as the expressed intention of the majority of the people. I remind myself that in a democracy ultimate responsibility rests with the elected representatives. It does not rest with the judiciary which is not

> answerable to the people, and indeed is made constitutionally independent of their representatives. Thus I think that when I am deciding whether or not a limit is justified I must be careful not to substitute my opinion on a policy matter for that of those who must answer to the public for their opinions and decisions on such matters.

The balance is reflected in the words of Pratte J. of the Federal Court of Appeal in Operation Dismantle Inc.:

> The respondents claim that the appellants' decision to test the cruise missile violates their right to life and security as guaranteed by s.7 of the Charter. In interpreting that provision, it should not be forgotten that, if the enactment of the Charter brought an important change in our Constitution, it nevertheless did not modify our whole system of government. We continue to be governed by a Constitution "similar in principle to that of the United Kingdom" under which the laws are made by the elected representatives of the people to whom the Cabinet and Ministers are answerable for their decisions. The words used in the Charter and, particularly, in s.7, should not, therefore, be given so wide an interpretation that the courts would, as a result, be invited to substitute their opinions to those of Parliament and the Executive on purely political questions. The Charter was enacted for the purpose of protecting certain fundamental rights and freedoms; it was not meant to confer legislative and executive powers on the judges (footnote omitted).

Three members of the court held that the Charter applied to the royal prerogative, one member considered it did not and the fifth did not decide that point. However, the action was dismissed on the ground it did not show a cause of action.

However, there has been some judicial deference to the legislature. For example, Galligan J. in the Inflation Restraint Act case stated

> a court should be entitled...to think that there is a fair or reasonable probability that the people's elected representatives in passing [legislation] have not acted capriciously, selfishly, arbitrarily or with ulterior motives.

Smith J. in the Divisional Court decision of the Inflation Restraint Act case also indicated that the courts will not engage in an assessment of the appropriateness of the legislature's political decisions.

> The court is not concerned with the question of whether the political judgment was right or wrong regarding which one of the many available solutions or measures was the most appropriate. The electorate will be the judge. Speaking generally, it is one thing to say that the Charter is supreme and that the supremacy of Parliament has been eroded and quite another to cause the elected representatives to be stymied in the kinds of programmes which, in their judgment, are required or desirable to save or to further the well-being of the collectivity in the economic sphere as much as in security and defence.

In Retail, Wholesale and Department Store Union v. Government of Saskatchewan, [1984] 4 W.W.R. 717 (Sask. Q.B.) (the Dairy Workers Act case), Sirois J. considered that the courts should defer somewhat to the legislature:

> These elected representatives are responsible to and answerable to the people for the use they make of the sovereign power that is entrusted to them. The courts must in this sense respect the duly enacted

> legislation, which must be looked upon as the expressed intention of the majority of the people.

In Hunter v. Southam, the Supreme Court seemed to indicate that while deference may not be in order, a division of labour is:

> While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional. (p.169)

However, the courts have the jurisdiction to determine whether the legislature's attempts to comply with the constitution do indeed comply.

Madame Justice Wilson, at p.23 of her concurring judgment in the Supreme Court decision of Operation Dismantle, examined the American and British approaches to political questions and distinguished between the Court's being asked "to express its opinion on the wisdom of the executive's exercise of its defence powers" and its being asked to determine whether the policy contravenes constitutional rights. The court is obliged to undertake the latter exercise, regardless of whether the issue can be described as a "political question".

Even so, Her Ladyship went on to suggest that some and indeed many actions taken by government in furtherance of national defence might be beyond the scope of the Charter, specifically section 7. However, she did not provide guidelines to distinguish which decisions would fall outside the scope of the Charter. The only hint is that a decision which posed "a direct threat to some specific segment of the populace" (p.55) would be encompassed by section 7.

The change is not as complete as section 52 alone suggests. Through section 33 the Parliament and provincial legislatures retain most of their "supremacy", should they wish to apply it.* Although the override does not apply to all the rights and freedoms guaranteed by the Charter, it applies to the "Fundamental Freedoms", the "Legal Rights" and the "Equality Rights". The existence of the override is why the term "quasi-entrenchment" is used by some commentators (Mackay, 55, 81). In this respect the legislature can retain control but not, probably, without a price, a price paid not once but over and over again since the override ceases to have effect after five years and must be re-enacted if the government wishes it to continue. Furthermore, the courts appear to be attempting to maintain the traditional division of labour between the legislature and the judiciary by refusing to become drafters of legislation.

Much of the analysis and examination of the Charter has centred on the judiciary (what will the courts do?). Yet while it is assumed below that the courts have a highly salient role to play in relation to section 1, we should not lose sight of another effect the Charter can have. It can encourage governments to impose on themselves a self-examination of their own legislation and goals. They must be prepared to justify decisions with concrete evidence. Governments must also decide how the Charter's promise can best be realized. The Supreme Court of Canada has stated unequivocally in Hunter v. Southam that "it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements" (p.169).

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* It has been argued that the courts have jurisdiction to determine under section 1 whether the legislature is justified in invoking section 33 (Slattery). However, the application of section 1 to rights and the reason for the inclusion of section 33 both suggest that the legislature has complete discretion with respect to section 33.

SUMMARY OF PAGES 117-129

III. SECTIONS 15 AND 1

A. Understanding Section 1

Four topics are discussed in relation to section 1:

1. The application of section 1 to section 15;

2. Evidence required to demonstrably justify a reasonable limit;

3. The requirements of "prescribed by law";

4. The requirements of "in a free and democratic society".

1. The application of section 1 to section 15

Discussion of the extent to which the requirements of section 1 apply to section 15.

(a) Approach 1: all the requirements of section 1 apply to section 15

Section 15 contains no explicit limitation; therefore, the only limitation can be found in section 1.

The procedure the courts have endorsed is a two-stage one: the determination of whether the right has been infringed and then a determination of whether the infringement is justified under section 1. This procedure applies to section 15 which, on this view, is to be read as unqualified.

(b) Approach 2: only certain requirements of section 1 apply to sections in which there is an express or implied qualification

Where there is an express qualification or where a qualification can be read into a section, the only limits which the government can impose would be those permitted by that express or implicit limitation. The government would then have to show that the limit is demonstrably justified, prescribed by law, and one acceptable in a free and democratic society, in accordance with section 1.

III. SECTIONS 15 AND 1

This part of the paper considers the most significant interpretive issues posed by sections 15 and 1. It begins with the issue of whether section 1 is applicable to section 15, then discusses the meaning of section 1 itself, continues with a lengthy examination of section 15, and ends with a brief discussion of procedural issues. There may be more than one way of viewing some of these issues. Accordingly, where applicable, the paper sets a number of possible approaches to an issue.

A. Understanding Section 1

1. The Application of Section 1 to Section 15

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

For the purposes of this paper, section 1 is relevant to the extent that it permits limitations on the equality rights guaranteed by section 15. There has been some debate in the literature and to a lesser extent in the cases about the application of section 1 to the rights and freedoms guaranteed by the Charter. Although on its wording, section 1 would seem to apply to every right and freedom, some of the rights seem to contain their own limitation with the result that it is difficult to apply section 1 to them. The discussion begins, therefore, with the question of whether section 1 applies to section 15.

(a) Approach 1: All the Requirements of Section 1 Apply to Section 15

This view is that section 15 is an unqualified right, and accordingly section 1 applies to it to provide the only available source of limitation. Thus the court determines under section 15 whether a right has been infringed and if it has been, it determines under section 1 whether the infringement is reasonable.

This view is supported by decisions at the appellate level, which have stated that the examination of an infringement is a two-stage process: the first stage is the determination of whether the right has been infringed; the second stage is whether the infringement is justified under section 1. The Ontario Court of Appeal in Re Federal Republic of Germany and Rauca explicitly rejected the approach that the right to remain in Canada is itself a qualified right and that the plaintiff had to show that the Extradition Act was not a reasonable limit. In setting out, the two-step approach, the Court did not appear to be restricting it to the specific right at issue in that case:

> First, it has to be determined whether the guaranteed fundamental right or freedom has been infringed, breached or denied. If the answer to that question is in the affirmative, then it must be determined whether the denial or limit is reasonable and demonstrably justifiable in a free and democratic society.

More recently, Mr. Justice Tarnopolsky has also supported this approach in R. v. Videoflicks Ltd. et al.:

> the rights and freedoms set out in the Charter must be defined first and then a court must consider whether a limit on such a right or freedom is a reasonable limitation expressed by law and which is demonstrably justifiable in a free and democratic society.

This approach has also been approved by the Alberta Court of Appeal in Reference re the Public Service Employee Relations Act. These comments would seem to apply to the relationship between all the rights and freedoms and section 1. This view is supported by the fact that section 1 itself makes no distinction among the rights and freedoms, but seems to be applicable to all rights, including section 15.

The two-stage approach requires that the scope of the right be determined prior to the application of section 1. At p.53 of her concurring judgment in Operation Dismantle, Madame Justice Wilson expressed this view: "The rights under the Charter not being absolute, their content or scope must be discerned quite apart from any limitation sought to be imposed upon them by the government under s.1". The majority did not express an opinion on this issue.

The cases set out the two-stage process as if each stage is a clearly identifiable and discrete step. In practice, that may not be easily accomplished. Strayer has argued that "while this sequence of steps is logical, it is unlikely to be so neatly divided in practice". He asks whether a right which has been properly limited by section 1 continues to exist "in its theoretically ideal form". He suggests that an insistence on refining the content of rights unduly could lead to "sterile debates" about the kinds of activity included in the right:

> These difficulties arise from treating certain guarantees as absolutes with the consequential need of limiting the situations in which they can be said to apply. The thrust of the Charter is otherwise. Section 1 recognizes that the Charter rights and freedoms are relative, not absolute. It strikes a compromise between individual interests and majoritarian democracy, and was so intended. Therefore it is sterile to spend a lot of time hypothesizing the perfect form of a right or freedom to determine whether there is a conflict with it in that form, without at the same time looking to see if a limit has been imposed on it defensible within the terms of s. 1. And here the presumption runs against those asserting that limit. (Strayer, 226-227)

There is little doubt that a rigid line cannot be drawn between the section 15 and section 1 inquiries. Nevertheless, to the extent possible, care must be taken to ensure that a right is not assumed to be limited until the government has satisfied the court that the limit on the right has been properly applied in accordance with section 1. A right which has been properly limited for one purpose or under certain circumstances is not thereby limited for all purposes. Each limitation must be justified under the circumstances of the specific case. Without some understanding of the scope and significance of the initial right, it is difficult to determine whether the limit is in fact (and law) reasonable. And while Strayer agrees that the onus is on government under section 1 (as has now been confirmed by the Supreme Court of Canada in Hunter v. Southam), there is likely to be greater confusion about the shift in onus if the two inquiries are not kept distinct as much as possible.

(b) Approach 2: Only certain requirements of section 1 apply to sections in which there is an express or implied qualification

Certain sections of the Charter are expressly qualified, some in terms similar (or indeed in part the same as) those found in section 1. For example, section 8 guarantees the right to be free from unreasonable search and seizure. It is difficult to see how section 1 will be applied to those sections. Indeed, one court has suggested that where a right or freedom contains its own limit, there is no need to resort to section 1 (Moore v. The Queen). Even so, according to Ewaschuk J. in Moore, the government may still have to justify the limit:

> In considering the compendious meaning of "cruel and unusual" I consider that no reference need be made to s.1 of the Charter. Where the particular Charter provision contains its own modifier, e.g., unreasonable, arbitrary or cruel and unusual, the provision is self-defined as to what constitutes a reasonable limitation. For that reason, the onus is on the applicant to establish the infringement, although the Crown may in the particular case tactically have to justify the limitation.

Under such a scheme, it seems that the plaintiff has the onus of showing (in that case which involved a challenge to the dangerous offender provisions) that "the indeterminancy aspect of the dangerous offender finding constitutes cruel and unusual punishment". This is no different than under any other section. The plaintiff always has the onus of proving the right has been infringed. In Moore, the right was to be free from cruel and unusual punishment; therefore the plaintiff had to prove that the punishment to which she was subject was cruel and unusual. If she was successful, the government then had the opportunity to justify inflicting such punishment.

Mr. Justice Ewaschuk seemed to be saying that the justification process does not occur under section 1 but under section 12. On the other hand, the first sentence of the above quotation suggests that it is only with regard to defining the limit that section 1 is inapplicable. If so, the government cannot claim that the limit is reasonable. Section 1 would then be applicable not in relation to reasonableness but only in relation to "prescribed by law" and "demonstrably justified": the government would have the onus of showing that the limit is prescribed by law and that it is demonstrably justified.

In Soenen v. Director of Remand Centre et al (1983), 33 C.R. (3d) 206 (Alta. Q.B.), Mr. Justice McDonald also considered the interaction between section 12 and section 1. He took the opposite approach, holding that section 1 is to be applied to all the rights and freedoms, for "it is only when the limiting part of section 1 is invoked and applied that any issue of balancing of individual interest against those of the collectivity, or any other judicially-created limiting device, comes into play. If it were otherwise, that is, if the guaranteed rights were relative in their context, section 1 would be redundant". However, McDonald J., in going on to consider the issue before him, whether a specific treatment could be considered "cruel and unusual", appeared to conduct the inquiry under section 12. He considered the following questions to be relevant:

1. Is it in accord with public standards of decency and propriety?

2. Is it unnecessary because of the existence of adequate alternatives?

3. Can it not be applied upon a rational basis in accordance with ascertained or ascertainable standards?

These were the questions to be asked to determine whether treatment is "cruel and unusual"; but they seem very much like the questions the court would ask under section 1. Since McDonald J. found no violation of section 12 he did not get to section 1, so we do not see what reasonable limits to protection from "cruel and unusual punishment" look like.

The approach set out above appears to have been applied by McDonald J. in Re Reich and College of Physicians and Surgeons of the Province of Alberta (1984), 9 C.R.R. 90 (Alta. Q.B.). That case concerned an allegation that the applicant's section 8 rights had been infringed when patient records had been obtained from him. McDonald J. stated that in relation to section 8, to which he limited his remarks, "if a court concludes that a rule of law violates [section 8], the state cannot then be heard to assert that the rule of law is a 'reasonable limit' under section 1". It might be noted here that Mr. Justice McDonald defined "unreasonable" in section 8 by reference to jurisprudence under section 1 and found that unreasonable means "without a rational basis". His Lordship stated that, having found that section 8 had been infringed, "the question whether the provisions of the statute constitute a reasonable limit on the rights protected by s.8 is foreclosed. The question has already been answered once it has been decided whether the statute or a procedure constitutes an unreasonable search and seizure". The Court then must embark on an inquiry about whether the limit can be demonstrably justified in a free and democratic society. However, it should be noted that after Mr. Justice McDonald considered section 1, he held that "even if s. 37(1) is inconsistent with s.8 of the Charter, it is a reasonable limit on the right protected by s.8, and it is a limit which is demonstrably justified in a free and democratic society...."

In R. v. Rao (1984), 46 O.R. (2d) 82 (leave to appeal to Supreme Court dismissed, October 11, 1984), the Ontario Court of Appeal held that section 10(1) of the Narcotics Control Act was inoperative "to the extent that it authorized the search of a person's office without a warrant in the absence of circumstances which make the obtaining of a warrant impracticable". The Court continued that "beyond that it is unnecessary to go in the present case". This section, it was held, was unconstitutional (to the extent stated above) as authorizing an unreasonable search. No reference was made to section 1 of the Charter. The judgment is, however, carefully reasoned and very detailed. It is difficult to believe that, if the court thought that they were dealing with only the first stage of a two stage inquiry this fact would not have been mentioned.

The Supreme Court of Canada dealt with section 8 in Southam without answering the question of the extent of the applicability of section 1 to section 8. The government made "no submissions capable of supporting a claim" that unreasonable searches are nevertheless a reasonable limit on the section 8 right:

> I leave to another day the difficult question of the relationship between those two sections and, more particularly, what further balancing of interests, if any, may be contemplated by s.1, beyond that envisaged by s.8. (p.170)

In considering the applicability of section 1 to the rights set out in the Charter, the important issue is not only whether there can be a reasonable limit on the freedom to be secure from unreasonable action, but also whether prescribed by law applies to the qualified rights. If section 1 does not apply at all, then limits do not have to be prescribed by law. Since this is unlikely, the only way in which section 1 would not apply, if in some sense it does not, is that it would not be available to the government to show that the limits are reasonable once an infringement has been found. This view is based on there being an internal limit with the right (see above, pp.121ff.). The remainder of section 1 would apply: therefore the onus would still be on the government to show the limit (in the section itself) is demonstrably justifiable and is prescribed by law.

Finch J. considered section 1 in relation to section 7 of the Charter in R. v. Robson (1984), 56 B.C.L.R. 194 (B.C.S.C.). The case involved a challenge to legislation which provided that where a police officer suspects that a driver has consumed alcohol, the driver's licence may be suspended for 24 hours. Robson was convicted under the legislation and appealed on the ground that the provision was an infringement of section 7 of the Charter. Finch J. found that the provision contravened section 7's guarantee of liberty. He then went on to find whether the deprivation was "in accordance with the principles of fundamental justice". He considered three factors in relation to this inquiry:

(1) The extent to which the right ("liberty") is deprived by the legislation;

(2) The nature of the evil intended to be curbed by the legislation; and

(3) The extent to which the legislation deprives the right to liberty in situations which are not relevant to the evil to be curbed.

He found that weighing factors 1 and 2 would lead him to conclude that the deprivation of liberty was in accordance with fundamental justice. Although the suspension of a driving licence for 24 hours was not an "insignificant deprivation", it was justified by the need to control the evil of impaired driving. However, the wording of the section being challenged might permit an officer to invoke it arbitrarily. Therefore, he held that the section was not consistent with the principles of fundamental justice. Finch J. stated that "the considerations to be applied with respect to s.1 are essentially the same as those to be considered with respect to 'fundamental justice'. It seems most improbable that a court could find a provision to be 'fundamentally unjust' but then find that the same provision was a 'reasonable limit' pursuant to s.1 of the Charter".

In Singh, Wilson J., two other members of the Court concurring, did hold that procedures for the determination of refugee status under the Immigration Act were incompatible with section 7 of the Charter and then went on to consider whether the limit was a reasonable one under section 1. However, she held that the section 1 requirements had not been satisfied.

Section 10 may also be seen as a qualified right, although perhaps less clearly so than section 8, for example, since a person has the right to be informed promptly of the reasons for arrest or detention and to instruct counsel without delay. In Therens, the Supreme Court found an infringement of section 10(b). The Court went on to consider the application of section 1 to the infringement of the right but found that the limit was not prescribed by law. LeDain J., McIntyre J. concurring, and Dickson C.J.C. in agreement, appeared prepared to apply section 1 to the infringement of a section 10(b) right but considered the failure to prescribe the limit by law fatal to that inquiry (pp.31-33 of LeDain J's reasons). Estey J., Beetz, Chouinard and Wilson JJ. concurring, stated explicitly that section 1 "subjects all Charter rights, including s.10, 'only to such reasonable limits prescribed by law...'" (p.3 of Estey J.'s reasons). However, he found there was no reason to consider section 1 because "Parliament has not purported to place a limitation on the right of the respondent under s.10(b) of the Charter". Lamer J. was in agreement with Estey J. on this point.

In situations involving a right with inherent qualifications, it is argued, there is no need to ask -- once a violation has been found -- whether the practice is a "reasonable limit". Where the right or freedom by definition precludes a defence of reasonableness outside the working of the provision, a finding of violation will end the inquiry.

The limited application of section 1 may not be limited to sections containing an explicit modifier. Most, if not all, of the rights will be subject to some obvious qualifications. Freedom of expression is no doubt subject to the laws of defamation, for example. Freedom of religion would unlikely be available to allow ritual ceremonies involving physical harm to others. The right to vote is almost certainly limited to persons over a certain age. The right to remain in Canada is subject to extradition laws (Re Federal Republic of Germany and Rauca). Even without section 1, the Courts would probably have applied these and other limits, as they have done in countries in which the constitution contained no express exemption clause.

Section 15 can be analysed in a similar fashion. It can be argued, for example, that a prohibition against "discrimination" has always been shorthand for a prohibition against making a decision about an individual on the basis of factors not relevant to the matter in issue. It follows, then, that if the person is refused employment because he cannot perform the job, or an individual is denied benefits because she lacks the capacity to enjoy them, it is not discrimination. On this analysis, the term "discrimination" is implicitly qualified. This view is explored in more detail below (pp.254ff.); it is sufficient to state here that for the purposes of considering the relationship between sections 1 and 15, section 15 may be read as subject to certain obvious qualifications as the other rights and freedoms may be.

If it is correct that the rights and freedoms, including section 15 equality rights, contain their own limits, this approach asserts that there is no need to resort to section 1, at least as far as determining the limit is concerned. Section 1, rather than being a "guide" for the courts, is extremely vague. Although we can attempt to translate "reasonable limits" into something with more content, these attempts may ultimately prove to be little more than guess-work. Section 1 offers nothing that could not be acquired through a careful and purposive interpretation of the words of each right or freedom.

Significance of Selection of Approach

The major significance of the choice between these two approaches is the question of the extent of the onus on the plaintiff if we are dealing with internally qualified and not unqualified rights: what must the plaintiff show under section

15 in order to establish a prima facie case of infringement and shift the onus to government under section 1? Under approach 1, the plaintiff simply must establish that the right has been infringed; the onus shifts to government to justify the infringement under section 1. However, under approach 2, the plaintiff would have to show that the qualified right was infringed, e.g. that the discrimination was unjust. This question is discussed below at pp.254ff.

SUMMARY OF PAGES 132-163

2. Evidence Required to Demonstrably Justify a Reasonable Limit

(a) Extent of evidence required

With some exceptions, government will have to submit a strong evidentiary record to substantiate a limitation.

(b) Presumption of Validity Principle does not apply

Courts will not rewrite legislation or read it in such a way as to find it valid under the Charter, if it would otherwise be inconsistent with the Charter.

(c) Tests for Reasonableness

Discussion of the various tests which have been set out by the courts, including "rational basis" test and tests based on proportionality and effect on persons subject to the limitation; consideration of the MacKay test under the Bill of Rights which does not appear to apply to the Charter; the distinction between "necessary" and "reasonable".

Consideration of "reasonableness" tests under human rights legislation.

(d) Bona fide occupational qualification

Discussion of this concept in human rights legislation, with the caveat that the cases should be considered merely illustrative of the kinds of limitations which might apply under section 1; consideration of the distinction between "reasonableness" and "bona fide" occupational qualification".

Discussion of American and British tests.

2. Evidence Required to Demonstrably Justify a Reasonable Limit

(a) Extent of Evidence Required

To date the major consideration of section 1 has occurred at the Court of Appeal level. However, there has been some indication from the Supreme Court in Skapinker* that the evidentiary record submitted by government must be a strong one.

On the other hand, the courts have also indicated that under certain circumstances, the government may not have to provide evidence. Mr. Justice Galligan expressed this view in his dissent in the Inflation Restraint Act case:

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* Mr. Justice Estey, for the Court, stated at pp.383-384: "The development of the Charter as it takes its place in our constitutional law, must necessarily be a careful process. Where issues do not compel commentary on these new Charter provisions, none should be undertaken. There will be occasion when guidance by obiter or anticipation of issues will serve the Canadian community, and particularly the evolving constitutional process. On such occasions, the Court might well enlarge its reasons for judgment beyond that required to dispose of the issues raised. Such an instance might, in a small way, arise here...Counsel for the appellant Law Society, Mr. O'Brien, very candidly admitted that because s.1 and this very process were new to all, the record introduced by the appellant was rather slim. The originating notice which started these proceedings was one of the first under the Charter. As experience accumulates, the law profession and the courts will develop standards and practices which will enable the parties to demonstrate their position under s.1 and the courts to decide issues arising under that provision. May it only be said here, in the cause of being helpful to those who come forward in similar proceedings, that the record on the s.1 issue was indeed minimal, and without more, would have made it difficult for a court to determine the issue as to whether a reasonable limit on a prescribed right had been demonstrably justified. Such are the problems of the pioneer and such is the clarity of hindsight".

> It was argued by the applicant that once an infringement was shown, because the word "demonstrably" appears in s.1, it was necessary for the government to put evidence in the record justifying the infringement, and in the absence of evidence the attempt to justify the infringement must fail. I do not agree. It does not seem to me to be necessary for a government to produce evidence to prove the obvious in order to demonstrate justification. But if the reasonableness of the infringement is not obvious then it may be necessary to produce proof that is. (Emphasis added.)

In that case, Mr. Justice Galligan took judicial notice of the inflationary economic circumstances and did not require the government to provide evidence that restraint of inflation would be in the common good: he observed that the legislation "seems" to be a "worthwhile effort".* Tarnopolsky J.A. was also of the view in R. v. Videoflicks that a restriction or infringement may be "so obviously a reasonable limit that there is no need to require proof thereof by the Attorney-General". In the opinion of the Ontario Court of Appeal, the Sunday Closing laws constituted such a limit on freedom of expression in relation to the selling of video tapes on Sundays.

(b) Presumption of Validity Principle Does Not Apply

Section 1 makes it clear that an infringement of a right or a limitation on a freedom must be justified: it is not to be assumed to be valid. Associate Chief Justice MacKinnon stated in Southam (No 1) (juvenile trials case) that the presumption of constitutional validity is a test for division of powers cases, not civil liberties cases. The Ontario Divisional Court in the Board of Censors case stated that while the presumption of validity was not available, "courts will exercise considerable restraint in declaring legislative enactments, whether they be statutory or regulatory, to be unreasonable". This view was explicitly rejected by the Court of Appeal, which cautioned that it is not a principle for interpreting the Charter; there is "no presumption for or against the legislation"*.

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* This view was neither approved nor disapproved by the Court of Appeal which decided the appeal on jurisdictional grounds.

Related to the presumption of validity principle is the status of "old laws". In Southam (No.1) (juvenile trials case), Mr. Justice McKinnon rejected an implicit presumption in favour of old laws:

> If the fact that an Act had been on our statute books without challenge for a period of years was determinative of the question and issue raised by s. 1, no statute or section of a statute in existence prior to the Charter coming into force could be effectively challenged.

(c) Tests for Reasonableness

(i) Judicial Tests Under the Charter

The courts have addressed the issue of the requirements to be met by the government under section 1 in relation to challenges arising under sections of the Charter other than section 15. Although there is no conclusive test as yet, the Supreme Court has sketched out a test and there are some common elements in the more developed tests at the lower court level.

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* On the separate but related issue of the court's willingness to defer to the legislature, see above, pp.109-112.

In Big M Drug Mart Mr. Justice Dickson (as he then was) began to develop a section 1 test*. The first part of the test concerns the objective of the legislation. The objective must be of "sufficient importance to warrant overriding a constitutionally protected right of freedom". The second part of the test involves the means:

> ...[I]t must be decided if the means chosen to achieve this [sufficiently significant government] interest are reasonable -- a form of proportionality test. The court may wish to ask whether the means adopted to achieve the end sought do so by impairing as little as posssible the right of freedom in question. (p.531)

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* Madame Justice Wilson also discussed section 1 in a somewhat different sense in obiter at pp.56-57 of her concurring judgment in Operation Dismantle:

> Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a "political questions" doctrine and permits the court to deal with what might be termed "prudential" considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review.

No other members of the Court expressed an opinion on this view.

Madame Justice Wilson also addressed the s.1 issue in her concurring judgment:

> Although the Charter is...an effects-oriented document in the first instance, the analysis required under s.1 of the Charter will entail an evaluation of the purposes underlying the impugned legislation. I agree with the Chief Justice when he states in his reasons that s.1 demands an assessment of the "government interest or policy objective" at stake, followed by a determination as to whether this interest is of sufficient importance to override a Charter right and whether the means chosen to achieve the objective are reasonable. In addition, it would seem correct to say that the objective asserted as a reasonable limit under s.1 will necessarily reflect the purpose of the enactment in the division of powers analysis ...[W]ithout having to determine at this point the principles upon which an evaluation of a given governmental objective and its reasonableness has a limit on a Charter right will be premised, it is possible to state with certainty that this governmental objective or interest [to curtail religious freedom] cannot pass the s.1 test. Indeed, it was made clear in Quebec Protestant School Board...that legislation cannot be regarded as embodying legitimate limits within the meaning of s.1 where the legislative purpose is precisely the purpose at which the Charter right is aimed. (p.538)

The Supreme Court also considered the meaning of "reasonable" in Hunter v. Southam where the term was dealt with as a part of section 8, rather than of section 1, of the Charter. Nevertheless, we can expect the Court to apply somewhat the same kind of analysis to "reasonable limits" under section 1*. Dickson J. (as he then was) for the Court, said

> an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective. (p.157)

This approach may ensure a more stringent test than under the Bill of Rights. In any case, both the object of the legislation or administrative practice and the effect on the persons affected must be considered.

The treatment of section 1 in the Supreme Court's decision in the Quebec Protestant School Boards case relied heavily on the particular impugned provision challenged in that case. The Court stated that section 73 of the Charter of the French Language (or Bill 101) was "the prototype of regime" to which section 23 of the Charter was a response. The Court held that "the limits which this regime imposes on rights involving the language of instruction, so far as they are inconsistent with s. 23 of the Charter, cannot possibly have been regarded by the framers of the Constitution as coming within" the kind of limits allowed by section 1 (p.217). The Court did not need to address the question of section 1 itself. Effectively, this view means that if the Court determines that there is no conceivable way to justify legislation which conflicts with the Charter, then there is no point in considering section 1. Presumably these will be rare occasions.

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* In Re Reich, Mr. Justice McDonald engaged in the reverse process: he found support for his interpretation of "unreasonable" as used in section 8 in the meaning given by courts to the term as used in section 1.

Even if the Charter had predated Bill 101 so that the framers of the Charter could not have been aware of Bill 101's provisions, the Court concluded at pp.221-222 that section 73 would still fall. It could fall as an impermissible section 33 "exception" (to use the Court's term) to section 23 (since section 23 is not subject to section 33). It might also fall as a purported amendment to the Charter which does not follow the amendment procedure as set out in the Constitution. This alternative interpretation seems to uphold Deschênes C.J.S.C.'s view at trial that section 1 permits limitations, if justified, but never denials of rights and freedoms. On this view, denial of rights can be accomplished only by invoking section 33 in relation to the sections to which it applies.

In particular, some of the more extensively constructed tests have required that the infringement be proportionate to the reason for the limitation and the legislature's goal be legitimate (for example, per Deschênes C.J.S.C. in the Quebec Protestant School Boards case) or in furtherance of the common good (for example, per Galligan J. in Inflation Restraint Act case). Essentially, the test is manifested in the balance between individual rights and the public good, keeping in mind "the apparent intention of the Charter to prefer, where feasible, the right of the individual to be free from state interference to the interests of the state in advancing its purposes through such interference" (Hunter v. Southam, p.160, in the context of a challenge to section 8's prohibition of unreasonable search and seizure).

Where the lower courts have used a specific test, it has tended to be articulated as a "rational basis" test. Evans C.J.H.C. in Re Federal Republic of Germany and Rauca sets the test as a "rational basis" test: "a basis that would be regarded as being within the bounds of reason by fair-minded people accustomed to the norms of a free and democratic society". It should not be assumed that this is the same as the American "rational basis" test reflecting a level of scrutiny which defers considerably to the legislation. In U.S. jurisprudence, the "rational basis" test is one element in a constitutional approach applied by the Court which places the onus of proving the classification does not have a rational relationship with the goal sought on the party challenging the legislation. It is clear that under the Charter the onus under section 1 is on the party defending the legislation (Hunter v. Southam). Nor should it be assumed that it is the minimal test with the same label as used by the Supreme Court in the Anti-Inflation Act case. For Evans C.J.H.C. said in Rauca that the "standard of persuasion to be applied by the court is a high one if the limitation in issue is to be upheld as valid". In particular, since the liberty of the subject was in issue, "the evidence in support must be clear and unequivocal". The Court of Appeal in Rauca said only that the words "demonstrably justified" "place a significant burden on the proponents of the limiting legislation". The "rational basis" test enunciated by Evans C.J.H.C. was adopted by Sirois J. in the Dairy Workers case, without reference to the Chief Justice's accompanying comments about evidence and persuasion.

Galligan J. in obiter considered section 1 in the Inflation Restraint Act case in some detail; he also applied a "rationality test".* His Lordship found that the removal of the right of public sector employees to change their union and to strike was an infringement of freedom of association. He suggested that an aspect to be assessed by the courts is the possible "collision" between the common good and the right of the individual. The Charter, he seemed to suggest, is a tool available to the individual to even the "fight" somewhat but not intended to make the individual dominant over the common good.

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* The Court of Appeal decided the case on the interpretation of section 13(b) of the Inflation Restraint Act.

His Lordship set out a "minimum test", as he calls it, for justification of an infringement under section 1:

(1) Is the object of the legislation a reasonable objective in the advancement of the common good?

(2) Is the legislative programme reasonably appropriate to the furtherance of the object of the legislation?

(3) Is the infringement [of the freedom to strike] reasonably necessary to the success of the legislative programme?

(4) Is the infringement too great a price to pay for the presumed benefit to be obtained from the legislation?

Insofar as the first question is concerned, Galligan J. held that no evidence was required, since the object of the legislation was the restraint of inflation which, in his view, would clearly advance the common good. He then answered his second question by invoking McIntyre J.'s Bill of Rights test in _Mackay_ v. _The Queen_, [1980] 2 S.C.R. 370; he considered it "apparent" that the government "acted reasonably" in the sense that McIntyre J. used the word "rationally" in the _MacKay_ case. He found that the _Inflation Restraint Act_ was "an honest, _bona fide_ attempt to deal with a problem that has bedevilled many other legislative bodies here and elsewhere for well over a decade".

Mr. Justice Galligan's answer to the third question was dependent on his earlier finding that "a wage freeze is reasonable to advance the valid object of the legislation"; therefore, "abrogation of freedom to strike is reasonable", since striking would defeat the wage freeze. Finally, in relation to the fourth question, Galligan J. held that since public sector workers would benefit if the programme succeeded, the infringement was not too high a price to pay.

In the result, Mr. Justice Galligan found the legislation justified without the government having to produce any evidence. Yet he concluded that the government had demonstrably justified the legislation.

Other members of the court approached the matter somewhat differently. In relation to section 13(b) of the Act, O'Leary J. found it infringed freedom of association and that the government failed to submit evidence to justify it. Smith J. rejected most of the McIntyre J. test, accepting only that part which refers to legislation not based on motives offensive to the provisions of the Bill of Rights. He found that the "arbitrary or capricious" portion of the test was inadequate for Charter purposes.

Chief Justice Deschênes in Quebec Association of Protestant School Boards case also developed a test based on proportionality and the legitimacy of the legislation. The three part test developed by Deschênes C.J.S.C. was as follows:

1. A limit is reasonable if it is a proportionate means to attain the purpose of the law;

2. Proof of the contrary involves proof not only of a wrong, but of a wrong which runs against common sense; and

3. The courts must not yield to the temptation of too readily substituting their opinion for that of the Legislature.

This test could be labelled the "weaker" of his two tests (the second one is set out below). In certain respects, his "three principles" analysis is somewhat weakened by its derivation from English cases dealing with the right of Ministers to override local authorities. These cases concerned the development of the power of judicial review over administrative decision-making and the struggle between two levels of government, not the assertion of individuals' rights against state power. Further, the second part of the test seems to suggest that the onus is on the plaintiff to prove that no reasonable government would place the impugned limitation on the right(s) involved. This test was adopted by Sirois J. in the Dairy Workers case.

Yet when he comes to "operationalize" his three principles in the context of the challenge to section 73 of Quebec's Bill 101, dealing with the provision of English language instruction in the province's schools, Deschênes C.J.S.C. formulates a more restrictive, although still not entirely satisfactory, test:

> Has it been convincingly demonstrated to the court:
>
> (a) that the Quebec clause is necessary to achieve the legitimate aim set by Quebec [the "reasonable objective" element of Galligan J.'s test; Galligan J. also uses the term "necessary"]; and
>
> (b) that the rigour of the Quebec clause is not disproportionate to its purposes? [Similar to Galligan J.'s "reasonably appropriate" requirement.]

The first part of this test is more appropriately divided into the issues of 1) whether the aim is legitimate and 2) whether, if it is, the provision is necessary to that aim.

Mr. Justice McDonald also considered the requirements of section 1 in Re Reich. Since he had held that once an infringement of section 8 was found, it was not necessary to consider the"reasonable" element of section 1, he limited his consideration to "demonstrably justified in a free and democratic society". He expressed disagreement with Chief Justice Deschênes who related "demonstrably justified" to the means chosen by the legislature and the phrase "reasonable limits" to the legislative objective. McDonald J. stated that "both the phrase 'reasonable limits' and the phrase 'can be demonstrably justified' are capable of referring to both the Legislative object and the means chosen to achieve that object". He also stated that "in a free and democratic society" modifies both "reasonable limits" and "demonstrably justified". He emphasized that demonstrably justified does not contain the word "necessary" or a similar word or phrase. The phrases are therefore to be distinguished, on Mr. Justice McDonald's view, from the exemption provision of the International documents. However, he distinguished "justified" from "reasonable", "as there is a presumption against pleonasm in any statute or constitutional instrument". Thus "'can be demonstrably justified' demands reference to some quality or qualities different from rationality and in addition to it".

McDonald J. stated these qualities as follows:

> the phrase requires the state to satisfy the court, or, if the state has failed to offer proof or to attempt to persuade it, requires the court to be satisfied by the well-known circumstances, that in addition to the limitation being one of perhaps several or

> even many possible rational or "reasonable" means to obtain a rational state object, the object and the means chosen must be shown to be preferable to some other state object and preferable to some other means of attaining a state object. The degree to which the justifiability must be demonstrable in this sense will vary from the low end of the scale -- when it does little more than to show that the object and means are a rational choice -- to the high end of the scale -- when the object and means are necessary. The idea of "compelling state interest", found in American constitutional jurisprudence, may be aptly chosen to describe what is meant, as long as in using that phrase it is understood that we should take care not to import automatically the baggage of jurisprudence that is associated with it, and so long as it is understood that what is or is not compelling, either as to object or means, will vary according to the circumstances.

McDonald J.'s test would involve a comparison between the means chosen by the Legislature and alternative ways of achieving the goal. Whether or not this is consistent with the role of the courts, it would appear to be an easier task than his other requirement that the object chosen by the Legislature must be preferable to some other object. The range of objects available to the Legislature is sufficiently great that it would appear to be difficult to make such a comparison.

A more stringent test has also been considered. It would require the government to show why the absence of the limit would be disadvantageous, not only why the application of the limit is advantageous (or necessary or whatever the standard is). In R. v. Videoflicks, Tarnopolsky J.A. stated that

> No evidence was submitted concerning

> inconveniences that might result from permitting Sabbatarian exemptions. The Court could speculate that such exemptions place the beneficiaries in a privileged position. However, we received no such evidence. [He suggests that it seems obvious being closed on Friday is not a privilege; that many people do work on Sundays; and that employees forced to work on their Sabbath have a Code or Charter remedy.] I cannot but conclude, therefore, that the requirements of s. 1 have not been met in this case.

(ii) Tests set out in human rights caselaw

Keeping in mind the comments made earlier about the application of human rights caselaw to Charter cases, it is worth at least noting cases under human rights legislation. Two cases interpret the standard to be met under the predecessor B.C. Human Rights Code's "reasonable cause" provision*. Section 3 of the B.C. Code read as follows:

> 3(1) No person shall
>
> (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public; or
>
> (b) discriminate against a person or class of persons with respect to any accommodation, service or facility customarily available to the public,
>
> unless reasonable cause exists for the denial or discrimination.

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* The new B.C. legislation does not contain a reasonable cause provision.

> 3(2) For the purposes of subsection (1),
>
> (a) the race, religion, colour, ancestry or place of origin of a person or class of persons shall not constitute reasonable cause; and
>
> (b) the sex of a person shall not constitute reasonable cause unless it relates to the maintenance of public decency or the determination of premiums or benefits under contracts of insurance.

In Gay Alliance Toward Equality v. Vancouver Sun (1979), 27 N.R. 117, Dickson J. (as he then was) formulated a test for reasonable cause under the B.C. Code, although he qualified it by suggesting it was not meant to be complete:

> (i) the test is an objective, as distinct from a subjective one; (ii) the words "reasonable cause" are of wide application, the only restraint being that spelled out as in s.3(2); (iii) the word "unless" in the phrase "unless reasonable cause exists" places the onus of establishing reasonable cause upon the person against whom complaint is brought; (iv) the cause relied upon as justifying the denial of service or the discrimination must be honestly held; (v) "reasonable cause" must be determined on the particular facts and circumstances of each case.

It should be pointed out that this test was developed within the context of a dispute between two private parties, not within the context of interpreting the constitutional limits on government action. It also seems to import a notion of bona fide which may not be appropriate to a reasonableness test under section 1. For both these reasons, it should be assessed carefully.

In Holloway v. Clair MacDonald and Clairco Foods Ltd. (1983), 4 C.H.R.R. D/1454, the Board held that discrimination on the basis of pregnancy was discrimination on the basis of sex (the case involved a pregnant cashier who had been dismissed from her employment). But it also considered the reasonable cause approach under the section 8 equal opportunity in employment provision, stating that factors such as safety and business interests must be balanced against the rights of the group affected. It then tried to assign weight to the relevant factors:

> Without attempting a comprehensive formula, where a factor taken into account by an employer bears a strong correlation to a ground of discrimination set out in section 8(2), I believe that a compelling interest would have to be demonstrated to support a finding that for the purposes of section 8(1), reasonable cause existed for the conduct. In contrast, if an otherwise non-discriminatory policy had only a moderate effect on a protected group as compared with other groups, greater leeway may be appropriate in deciding whether section 8(1) has been violated. For example, if a requirement would exclude 35 percent of men and 65 percent of women, more leeway should be allowed in determining the reasonableness of the requirement than if it excluded 98 percent of women and a small percentage of men. The reasons justifying this approach are fairly obvious. If there is a close association of the characteristics with the group, the danger is greatest that the characteristic will be used as an excuse to discriminate against the group. Also, the relative impact on the group will be greatest in such circumstances. Where many people who are not members of the protected group are also excluded by the characteristic, the relative effect on the protected group is obviously less. The fact that others are also excluded also reduces the likelihood that the characteristic is being used simply as an excuse to exclude the protected group.

On this formula, since only women can become pregnant, the compelling interest standard applies.

It should be pointed out that this formula seems to be inconsistent with the scheme of the old B.C. legislation. The protected grounds of section 8(2) never constituted reasonable cause (unless qualified under section 8(2) itself); therefore, a formula linking the factor and the ground under section 8(2) in order to determine whether there had been reasonable cause is inappropriate. It is appropriate for a non-specified ground such as disability or an age outside the protected range. The test to be applied to the specifically protected grounds under section 8(2) was whether the factor was a bona fide qualification for the position. That was built into the right of equality given by section 8(1). However, since there may be no grounds under the Charter to which reasonable limit will not apply (with the possible but unlikely exception of sex), this weighing approach or one similar to it may be tempting. It should be remembered, however, that section 15 grants rights to every individual; once an individual has passed the threshold of showing enough adverse impact to constitute discrimination, the degree of disproportionate impact should not matter if constructive discrimination is prohibited by section 15.

The Federal Court of Appeal addressed the merits of compulsory retirement in Stevenson v. The Canadian Human Rights Commission, Air Canada, et al (1983), 4 C.H.R.R. D/1665. Stevenson argued that the exception under the Canadian Human Rights Act, which permits mandatory retirement at the "normal" retirement age in the particular industry, contravened the Bill of Rights. The Court dismissed Stevenson's appeal because 60 is the normal retirement age for the occupation of pilot. A "reasonableness" test was applied based on McIntyre J.'s test in MacKay.

The Chief Justice stated that not to allow a normal retirement age would mean that the employer would have to keep the employee on past the point of competence, in many cases endangering the employee, other people and the employer's property. Heald J. emphasized the danger to the public interest if pilots were allowed to fly until they demonstrated incompetence. McQuid D.J. expressed the view that "[i]n today's social context, retirement can be considered to be a normal incident of employment", as manifested both in private employment pension plans and public plans. He recognized that there was no "malice" in the choice of age 60 but simply accepted that that was the age fixed by the employer and union. Using the "valid federal objective" test, he concluded that mandatory retirement at age 60 was reasonable to obtain "a desirable social objective": orderly retirement from the workforce with dignity and some financial security while allowing other employees to advance. Such a justification, it should be noted, is not restricted to pilots. Furthermore, the valid objective test will likely not be the only consideration under the Charter; the effect on the individuals involved will also have to be considered (Hunter v. Southam, p.157).

(d) Bona Fide Occupational Qualification

Under section 1, there will be a balancing of the interests of government as representing the social or public good and the interests of the individual. Human rights caselaw has addressed some of the issues which might be factually relevant to this process, particularly in employment cases. In particular, the human rights cases have dealt with the concept of bona fide occupational qualification (hereinafter referred to as B.F.O.Q.) which is found in many human rights codes. These decisions may give some guidance in regard to the kind of evidence the government should be prepared to produce under the Charter. As previously noted, however, the value of the human rights caselaw is primarily for illustrative purposes; it has no legal link to section 1 of the Charter, especially where decisions concerning a bona fide qualification requirement are concerned.

The Supreme Court of Canada has articulated a test for a bona fide occupational qualification, at least part of which may be relevant under section 1. In Ontario Human Rights Commission and Dunlop, et al vs. The Borough of Etobicoke, [1982] 1 S.C.R. 202, the Court held that mandatory retirement at age sixty for firefighters was a violation of the Ontario Human Rights Code. The employer had not discharged the onus of proof required to show that early retirement was justified as a bona fide occupational requirement. Adopting the test set out by Professor MacKay in Cosgrove v. City of North Bay (Ont., 1976), McIntyre J. reformulated it as follows:

> To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

At least the objective strand of this test might be useful in the employment cases under the Charter.

McIntyre J. elaborated on this test, applying it to the situation of teachers' being required to follow the tenets of their own religion as a qualification for teaching in separate schools in Caldwell v. Stuart, et al, [1984] 2 S.C.R. 603*. Speaking for the Court, His Lordship stated that "full effect" must be given to the religious element in the Catholic school in order to carry out the purposes of the school. The real dispute in the case was over the wording in McIntyre J.'s test in Etobicoke that the requirement "must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job". His Lordship held that "having in mind the special nature and objectives of the school, the requirement of religious conformance including the acceptance and observance of the Church's rules regarding marriage is reasonably necessary to assure the achievement of the objects of the school". (Caldwell had married a divorced man in a civil ceremony and for that reason was not rehired in her position as teacher in a Roman Catholic school.)

The Federal Review Tribunal in Carson v. Air Canada (1983), 5 C.H.R.R. D/1857, aff'g (1982), 3 C.H.R.R. D/818 (Fed. Trib.), upheld by F.C.A. (1985), 57 N.R. 221, clearly set out the opposing interests involved in age discrimination cases. These interests may apply to other grounds, although perhaps with different emphasis depending on the ground:

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* This case was decided under British Columbia's previous Human Rights Code under which certain grounds, including religion and marital status, were not to constitute reasonable cause for dismissal. But the right of equality in employment was dependent on bona fide qualifications even with respect to grounds which could not constitute reasonable cause.

> Canadian society has expressed increasing concern in recent years for human rights protection, including protection from age discrimination in employment. There are unquestioned adverse psychological, social and economic consequences for the person whose employment is terminated, or who cannot obtain employment, because of an employer's discrimination on the basis of age. At the same time, the employer and society have an unquestioned interest in allowing the employer to impose employment standards, including an age requirement, where such standards relate reasonably to legitimate business operations of the employer.
>
> The economic efficiency of the employer must be considered, both from the standpoint of the employer's direct self interest, and also society's indirect interest in the cost competitive and cost efficient production of goods and services within Canada. Similarly, the safety of the employee, his fellow workers, and the general public, are also necessary factors for consideration both from the standpoint of the economic self-interest of the employer, co-workers and public, and the general well-being of society. There must be a balancing of the conflicting interests of the employee (and the underlying societal value and interest in protecting him) and the employer (and the underlying societal value and interest in protecting him). Accordingly it is lawful in some circumstances for employers to recognize age as a factor affecting an employee's capacity, and act accordingly.

The Review Tribunal in _Carson_ applied the _Etobicoke_ test for _bona fide_ occupational qualification as follows: only if the job requirements involve risk which increases or skill which deteriorates with advancing age (and there is medical and other evidence to show that), _and_ there is no feasible way to test individuals, can qualifications be determined by age. Then age becomes a surrogate for what, in the pilot cases, is the real issue: physical impairment. The Review Tribunal found that the age policy of Air Canada was not justified by a bona fide occupational qualification*. The Federal Court of Appeal upheld the Review Tribunal's decision, although it found the Review Tribunal had erred on certain points which were not central to the decision. Mahoney J., Stone J. concurring, stated:

> Assuming, without deciding, that the effects of pilot aging on safety are as dire as any evidence suggested might be the case, where Air Canada failed was in establishing credible linkage between those risks and its maximum hiring age of 27 policy, so as to prove that policy to be a bona fide occupational requirement based on its safety concerns.

Two examples of the application of the test developed by Professor MacKay and later approved by the Supreme Court in Etobicoke concern handicap. In Foreman v. Via Rail Canada Inc. (1980), 1 C.H.R.R. D/111, a Federal Tribunal found that the standard of visual acuity set by Via Rail for the positions of waiter and waitress were not a B.F.O.Q. The Tribunal considered the standards and found "no satisfactory evidence" of their derivation, of any updating or of whether they had evolved according to accepted medical standards.

On the other hand, in Foucault vs. Canadian National (1981), 3 C.H.R.R. D/677, a refusal by CN to hire a Mr. Foucault as a bridgeman because of his injured back was held to be not discriminatory because the medical requirements were a B.F.O.Q. The Tribunal examined statistics showing the percentage of claims made to the Workers' Compensation Board comprised of back injuries and the proportion of railway injuries comprised of back injuries, specifically in the Bridges and Structures Section where Foucault would be working. A comparison of hours lost from injuries was made; a job study was entered as evidence along with medical evidence regarding Foucault's injury. It was held that CN had discharged the burden on it to show that the requirements were rationally based and not founded upon unwarranted assumptions or stereotypes. Again, the Tribunal did not require individual assessment as such. Since section 15 is an individual right, however, individual assessment may be necessary under the Charter.

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* Cf. the view of the Federal Court of Appeal in Stevenson v. C.H.R.A., above, pp.148-149.

Evidence in human rights decisions to show the necessity of a discriminatory requirement must be more than "impressionistic". In Etobicoke, MacIntyre J. stated that "[i]t would seem to be essential that the evidence should cover the detailed nature of the duties to be performed, the conditions existing in the work place, and effect of such conditions upon employees, particularly upon those at or near the retirement age sought to be supported". The evidence submitted by the Borough of Etobicoke was impressionistic. McIntyre J. indicated that such evidence was inadequate:

> I am by no means entirely certain what may be characterized by 'scientific evidence'. I am far from saying that in all cases some 'scientific evidence' will be necessary. It seems to me, however, that in cases such as this statistical and medical evidence based upon observation and research on the question of aging, if not in all cases absolutely necessary, will certainly be more persuasive than the testimony of persons, albeit with great experience in firefighting, to the effect that firefighting is a 'young man's game'.

However, it has generally been accepted that the employer has more leeway when public safety or safety of co-workers is involved. In Canadian Human Rights Commission v. Voyageur Colonial Ltd. (1980), 1 C.H.R.R. D/239, A.D. Abbott considered medical and other expert testimony and concluded that, although there was no reliable scientific or statistical evidence to establish a relationship between age and ability to cope with stress, particularly in the specific circumstances of Voyageur job conditions, there was no better evidence available: age was accordingly a B.F.O.Q. In reaching this conclusion, Abbott cited the head note of Hodgson v. Greyhound Bus Lines 499 F. 2d 850 (U.S. Court of Appeals):

> While a company must demonstrate that it has rational basis in fact to believe that elimination of its maximum hiring age will increase likelihood of risk of harm to its passengers, it need demonstrate only minimal increase of risk of harm since it is enough to show that elimination of challenged hiring policy might jeopardize life of one more person than might otherwise occur under that policy.

Abbott concluded that the burden of proof on the employer is lighter where the public safety is involved. The burden in bus driver cases is light since safety is the essence of the operation and one reasonably reliable predictor of the ability to cope with the stress (the specific difficulty in Voyageur Colonial) is age. The standard set by Abbott in Voyageur Colonial seems to be consistent with McIntyre J.'s analysis of the kind of evidence required in Etobicoke, since in this case it does not seem possible to present other than general scientific evidence.

Peter Cumming reviewed the case law on B.F.O.Q. in O'Brien vs. Ontario Hydro (1981), 2 C.H.R.R. D/504 (informal upper age limit for entry to apprenticeship programme) and concluded that "type of job and the evidence of age related capacity are the two important considerations in assessing the validity of an occupational qualification". In considering how these will be applied, he said the following (references omitted):

> Where the job is hazardous, an arbitrary age limitation may be tolerated if supported 'in fact and reason'; scientific data is [sic] not necessary...However, if medical tests are readily available, they may go to show that an age limitation is unnecessary... Where no element of risk is involved, merely the ability of the employee to carry out his or her function, then 'convincing evidence' or 'sound reasons' must be brought forward to show that age was a reliable indicator of capacity...The ancillary requirement is that the age limitation was imposed merely to avoid the provisions of human rights legislation.

Both safety and the inability to predict or measure the individual effects of age would be examples of relevant factors under section 1 in relation to mandatory retirement.

The dominant tests in relation to B.F.O.Q. in the United States were developed under Title VII of the Civil Rights Act in Weeks v. Southern Bell Telephone, 408 F.2d 228 (1969) (U.S. Court of Appeals, 5th Cir.) and Diaz v. Pan Am World Airways, Inc., 442 F.2d. 385 (1971) (U.S.C.A., 5th Cir.) (Cert. denied, 404 U.S. 950 (1971)). For a discussion of American caselaw on the test to be met under equal protection law, rather than under Title VII, see below (pp.301ff).

The Weeks case held that male gender was not a B.F.O.Q. for the position of switchman [sic] with Southern

Bell. The Court held that the burden was on the employer and that the defence should be narrowly construed. It also held that the bona fide occupational qualification applied only when there was "reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved". The only exemption would be if it was impossible or impractical to deal with persons with the particular trait on an individual basis. Again, this might not constitute a sufficiently high standard under section 1: under the Charter, it can be argued that as long as the plaintiff can do the job, her individual right to equality has been denied if she has been denied the job because "substantially all" women could not do it.

In Diaz, the Court of Appeal overturned a decision by the Trial Court that being female was a B.F.O.Q. for the position of flight attendant. The exception was to be read narrowly so that it would not "swallow the rule". Diaz had been brought under Section 703(e) of the Civil Rights Act, 1964 which permits discriminatory hiring "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise...." It is to be noted that the business necessity, not business convenience, standard derives from the wording of section 703(e). The Court stated that a B.F.O.Q. applies only when the "essence of the business operation" would be undermined by not hiring members of one sex exclusively. It held that the employer cannot exclude all (in this case) men because most men may not perform adequately tasks which all women can perform. Before sex discrimination can be allowed, the employer must show that not only is it impracticable to find a man who possesses the abilities, but that the abilities are necessary to the business and are not tangential.

The Weeks burden was considered in Usery v. Tamiami Trial Tours Incorporated, 531 F.2d 224 (U.S. Court of Appeals) which concerned a prohibition against applications for bus drivers from persons between the ages of 40 and 65, a claim of discrimination under the Age Discrimination Employment Act. The Court held that the Weeks burden is not met, in the American context, by the added expense of individual dispositions or by statistical evidence of a correlation between age and accident frequency. The Court found that the Diaz element (that the essence of the business was safety) was met and it then applied Weeks to determine whether there was a factual basis for this holding or whether it was impossible and impractical to deal with persons over 40 on an individual basis.

The Weeks and Diaz tests were adopted by an Ontario Board in Shack v. London Driv-Ur-Self Limited (Ont., 1974). Betty-Anne Shack was denied employment as a rental clerk because the job involved driving 5 ton trucks, stripping down trucks and working in the evenings alone. Professor Lederman cited the Weeks case proposition that an employer has to show that it "had reasonable cause to believe, that is, a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved". Lederman also adopted the essential function test from Diaz.

Similarly, in Segrave v. Zellers Limited (Ont., 1975), the Respondent was unable to prove its contention that being female was a B.F.O.Q. of the job of personnel manager. The board found that the B.F.O.Q. defence under the Ontario Human Rights Code applies "only when discrimination based on sex affects the respondent's business as a commercial enterprise and the primary function of the business or enterprise would be undermined by not hiring members of one sex exclusively" (as discussed below, this is the standard test).

In Canada employers have been required to show that the impugned requirement is necessary to the functioning of the business. In Carson v. Air Canada, the Federal Tribunal said that the essential functioning of the business must be at stake to substantiate a bona fide occupational requirement, not merely its administration. It rejected Air Canada's defence that its return on its investment would be lower for older pilots: "It has been accepted that economic considerations generally cannot be invoked to establish the bona fide occupational requirement defence". Accordingly, a cost justification defence is not usually available in such circumstances. The Review Tribunal took the same view on the facts of Carson, but left open the possibility that in another case, there might be an economic justification for age discrimination if there were considerable evidence to prove it.

The business necessity approach, discussed in the American cases and Carson v. Air Canada, has also been taken in some British cases. In Steel v. Union of Post Office Workers, [1978] ICR 181 the Employment Appeal Tribunal stated that a distinction should be made between "a requirement or condition which is necessary and one which is merely convenient, and for this purpose it is relevant to consider whether the employer can find some other and non-discriminatory method of achieving his object" (cited in Pannick, 903). In that case, allocating postal walks by seniority discriminated against women since "by reason of direct sex discrimination in 1975, many women had been placed at a permanent seniority disadvantage to their male colleagues for the rest of their careers" and was not "justifiable". In Price v. The Civil Service Commission,

[1978] ICR 27 (EAT), , the maximum age requirement was not "justifiable" because there were other means "to enable the employer to further its aim of a balanced career structure".

In another case involving a prohibition against beards which discriminated against Sikhs, the Employment Appeal Tribunal (EAT) seemed to apply a lower standard. It said the employer did not have to show the requirement of no beards was "absolutely essential" but that it was "necessary" and was "applied reasonably and with common sense". It found the policy justifiable on health grounds, even though it was enforced in only two of eight factories.

In another race discrimination case, "justifiable" was held to mean "reasonably necessary" or "right and proper in the circumstances". The Manpower Services Commission had refused to sponsor persons for training who lacked managerial experience, a policy which had a disproportionate impact on blacks. The tribunal, EAT and the Court of Appeal all held the policy was justifiable because the rejected persons would not be able to get jobs subsequent to the training, thereby damaging the reputation of Manpower. The Court of Appeal's loose test for "justifiable", similar to the American "rational basis" test, was criticized by Pannick in his discussion of disproportionate impact in the United Kingdom; his criticisms are set out in full because they raise factors which may be relevant to the section 1 test under the Charter:

> In Ojutiku [the Manpower Services Commission case referred to above], the Court of Appeal adopted a loose test of "justifiability" under s.1(1)(b)(ii) of the Race Relations Act. Eveleigh LJ held that "if a person produces reasons for doing something which would be acceptable to right-thinking people as sound and tolerable reasons for so doing, then he has justified his conduct". Kerr LJ

> noted that "advancing good grounds" is one of the dictionary definitions of "to justify". Stephenson LJ spoke of the need for "good and adequate reasons". The difficulty with this criterion of justifiability is that a defendant will rarely not have a good reason for applying the impugned criterion. Nor does s. 1(1)(b) merely render unlawful conditions or requirements which are neutral on their face but which are applied with the intention of treating persons less favourably on grounds of sex (or race), as the provisions on remedies emphasize. The Court of Appeal appears not to have appreciated that Parliament has required justifiability to be assessed in the context of a policy which has a disproportionate adverse impact on a protected group. Such a policy is prima facie unlawful. The burden is on the defendant to prove justifiability. It is surely contrary to the intentions of Parliament to test justifiability in a vacuum; rather one should ask whether the defendant's objectives outweigh the disproportionate adverse impact. To apply a test similar to that in administrative law, of whether a reasonable defendant could act in this way, is unnecessarily to dilute the law. It is regrettable that Griggs is not mentioned in the judgments. Perhaps the mischief of Ojutiki can be diminished in later cases: the Court of Appeal was not dealing with a case where a defendant could achieve its goal by the adoption of different means which do not have the disproportionate adverse impact.
> (Pannick, 904)

Griggs, an American case in which constructive discrimination was held to be prohibited under Title VII of the Civil Rights Act, is discussed below, at pp.260-261.

Pannick goes on to discuss cases in which the employer's policy was held to be not justified: these include a refusal to hire people with younger children (disproportionate impact on married women compared to unmarried women; justification was to ensure employee reliability); a requirement that Bar students with a foreign non-law degree had to take a two year course instead of a one year course (disproportionate impact on basis of race, place of origin; justification was "to ensure foreign students develop an adequate knowledge of the English way of life"); redundancy procedure by which part-time workers dismissed first (disproportionate impact on women; justification was that majority of workforce wanted the system and that it was common throughout the industry); a condition that job applicants should not live in the City Centre (disproportionate impact on blacks; justification was fear that they would "attract their unemployed friends to the premises"), requirement that telex operators should become fully competent within six months without formal training (disproportionate impact on persons born abroad (place of origin); the Tribunal held that the justification was a convenience, not a business requirement). However, in a contrary decision, the EAT held that the requirement of wearing a uniform justified a prohibition against a female nurse's wearing trousers, even though it had a disproportionate impact on Sikhs.

While a range of general principles and specific examples can be culled from the caselaw discussed above, the competing concerns and appropriate method of interpreting exceptions under in human rights legislation were concisely summarized by MacGuigan J. in his concurring reasons in the Federal Court of Appeal decision in Carson:

> [In the Canadian Human Rights Act], Parliament has made a fundamental decision to give preference to individual opportunity over competing social values. The preference is not absolute. Indeed, it is limited in the present context by an

employers' right to establish a bona fide occupational requirement. But the Courts must be zealous to ensure that Parliament's primary intention that people should for the most part be judged on their own merits rather than on group characteristics is not eroded by overly generous exceptions. This necessitates a narrow interpretation of the exceptions.

SUMMARY OF PAGES 166-184

3. The Requirement of "Prescribed by Law"

Discussion of international jurisprudence in which the phrase "prescribed by law" or similar phrases are used, in particular a discussion of the Sunday Times case. Discussion of the Censor Board case under the Charter. Reference to statements made by the Supreme Court of Canada. Discussion of the application of the administrative law concept of vires as applied to the Charter.

Three approaches to interpreting the phrase are set out:

(a) Approach 1: Impugned government action must have an ascertainable legal mandate

Requires that action can be traced to a lawful authority or legal mandate. Based on three assumptions:

- legislation not to be taken to permit "unlimited arbitrary power";

- statutory power can be exercised only for purposes intended by the delegating statute;

- must be express language to show Legislature's intention to contravene constitutional guarantees.

Imports into Charter established administrative law concept of "vires".

(b) Approach 2: A limit on Charter rights must clearly be prescribed by law

Enabling legislation must confer power to infringe Charter right.

Conferring of power to infringe need not be detailed; a generally worded power is sufficient.

This approach makes legislatures accountable and limitations on rights discoverable. These are the two requirements of "prescribed by law".

Common law rules would likely not meet this test.

(c) Approach 3: limit must be prescribed by a precise legal limit not a legal discretion

Limit must be set in empowering legislation in detail.

Emphasis on discoverability rather than accountability but both requirements met.

Common law rules might meet this test if sufficiently notorious.

3. The Requirement of "Prescribed by Law"

This phrase may prove to be of particular importance where infringements on Charter rights are alleged to have been imposed by some government action apart from statute; for example, through policy directives or by the actions of administrative bodies. The Charter appears to forbid the infringement of the guaranteed rights and freedoms to be infringed through government action that is not "visible" or ascertainable by the public. This enhances the accountability of the legislature with respect to Charter infringements and will help ensure that any limits imposed are only of a kind permissible in a "free and democratic society."

The requirement that a limit be "prescribed by law" may have been borrowed from the European Convention on Human Rights. The European Convention contains identical or similar language in several of its limiting clauses. Our courts will likely look to the jurisprudence under the European Convention in interpreting the meaning of the same requirement in section 1 of the Charter. Accordingly, the European case law is included in the discussion below.

(a) International Jurisprudence

The expression "prescribed by law" appears in several of the limitation clauses of the European Convention (Arts. 9(2), 10(2), 11(2)). Similar expressions ("in accordance with law" and "provided for by law") appear in other clauses (Art. 8(2); and Arts. 1 and 2 of the 1st and 4th Protocols respectively). In the French text of the Convention, all of these expressions are rendered as "prévues par la loi".

The jurisprudence under the Convention indicates that the word "law" refers not only to statute law (Klass v. Federal Republic of Germany, 2 EHRR 214); but also to the common law (Sunday Times v. United Kingdom, 2 EHRR 245); subordinate legislation (X v. Switzerland DR 9, 206) and Royal Decree (De Wilde, Oomsand Versyp v. Belgium, 1 EHRR 373). The European Commission of Human Rights has said that the phrase "in accordance with law" refers also to the Rule of Law or "Principle of Legality", which is common to democratic societies and forms part of the common heritage of the Member States of the Council of Europe (Silver et al v. United Kingdom (5947/72) Report: 11 October 1980).

The European Court held in the Sunday Times case that two requirements must be met in order for a limit to be considered "prescribed by law". In this case the applicants had argued that the law of contempt of court was so vague and uncertain that its restraint on freedom of expression could not be regarded as "prescribed by law"; and it could not, therefore, limit the right to freedom of expression. The court, in holding that common law rules can meet the standard, stated as follows:

> In the court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible; the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able -- if need be with appropriate advice -- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. These consequences need not be foreseeable with absolute

> certainty: experience shows this to be unattainable. Again, while certainty is highly disirable [sic], it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

In keeping with these general principles, it has been held that rules about prisoners' correspondence established by unpublished administrative instructions to prison governors cannot be regarded as 'law' for this purpose (Silver et al. v. United Kingdom).

(b) The Charter

The French text of the Charter uses the phrase "par une règle de droit," which may be translated as "by a rule of the law". This term encompasses all orders and regulations, municipal by-laws as well as common and civil law rules.

The meaning of "prescribed by law" has been considered by the Supreme Court of Canada in the context of whether a demand by a police officer that a car driver accompany him to the police station and take a breathalyzer test under section 235(1) of the Criminal Code constitutes a detention, thus triggering the right to retain and instruct counsel and to be informed of that right as guaranteed by section 10(b) of the Charter. In Therens, all members of the Court held that such a demand did constitute detention and that the failure of police officers to inform Therens of his section 10(b) rights infringed the Charter. Furthermore, all members of the Court agreed that the infringement could not be saved by section 1*.

LeDain J. characterized the "prescribed by law" requirement under section 1 as being "chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary" (p.32). Limits expressly set out in statutes or regulations or resulting "by necessary implication from the terms of a statute or regulation or from its operating requirements" will meet the prescribed by law standard. A limit may also be prescribed by law if it derives from a common law rule. Since section 235(1) provides that the sample must be demanded and obtained "as soon as practicable" but within two hours of the alleged offence, it permits contact with counsel. The limit (that is, the infringement of the rights with respect to counsel) is not found in the statutory provision and is therefore not prescribed by law**. McIntyre J. expressly concurred with LeDain J. and the Chief Justice appeared to agree, saying:

> I also agree with Mr. Justice LeDain that s.235(1) does not create a limit, prescribed by law, under s.1 of the Charter, on a detained person's right to be informed of the right to retain and instruct counsel. Subsection 235(1) does not expressly or by necessary implication compel the police to

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* The Court split on the issue of whether the evidence should have been excluded under section 24(2). The majority held that it should have been, while the two dissenting justices held that it should not have been excluded because the police officer was acting in good faith on the basis of the Supreme Court decision in Chromiak v. The Queen, [1980] 1 S.C.R. 471 under the Bill of Rights.

** LeDain J. left open the question whether the two hour period is a justified limit on section 10(b) rights.

> deny a detained person's right to be informed of his s.10(b) rights. (p.1 of the Chief Justice's judgment)

The treatment of section 1 by Estey J., Beetz, Chouinard and Wilson JJ. concurring*, makes it clear that once a limit has been found to be not prescribed by law, there is no further inquiry under section 1. A failure to prescribe a limit by law is fatal to the opportunity to defend that limit:

> Here Parliament has not purported to prescribe any such limit and hence s.1 of the _Charter_ does not come into play. The limit on the respondent's right to consult counsel was imposed by the conduct of the police officers and not by Parliament. (p.3 of Estey J.'s judgment)

It would seem that actions of administrators or of other persons who carry out or enforce the law which are inconsistent with the Charter will be considered _ultra vires_ unless permitted by the governing statute, regulation or common law rule. The limit does not have to be expressly set out in the law but can be implied from the law, if it can be said to be a "necessary implication".

In _Re Ontario Film and Video Appreciation Society v. Ontario Board of Censors_, the Divisional Court interpreted the meaning of "prescribed by law" as follows:

> The Crown has argued that the board's authority to curtail freedom of expression is prescribed by law in the _Theatres Act_, ss. 3, 35 and 38. In our view, although there has certainly been a legislative grant

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* Lamer J. also seems to subscribe to this view.

of power to the board to censor or prohibit certain films, the reasonable limits placed upon that freedom of expression of film-makers have not been legislatively authorized. The Charter requires reasonable limits that are prescribed by law; it is not enough to authorize a board to censor or prohibit the exhibition of any film of which it disapproves. That kind of authority is not legal for it depends on the discretion of an administrative tribunal. However dedicated, competent and well-meaning the board may be, that kind of regulation cannot be considered as "law". It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.

There are not reasonable limits contained in the statute or the regulations. The standards and the pamphlets utilized by the Ontario Board of Censors do contain certain information upon which a film-maker may get some indication of how his film will be judged. However, the board is not bound by these standards. They have no legislative or legal force of any kind. Hence, since they do not qualify as law, they cannot be employed so as to justify any limitation on expression, pursuant to s.1 of the Charter. We draw comfort in this conclusion from the views of Professor Beckton, in The Canadian Charter of Rights and Freedoms: Commentary (1982), p.107 (Tarnopolsky & Beaudoin, editors), where she wrote:

> Clearly statutes which create censorship boards without specific criteria would be contrary to the guarantees of free expression, since no line is drawn between objectionable and non-objectionable forms of expression. Now standards will have to be created to measure the limits to which obscene expressions may be regulated.

(Emphasis added.)

The decision in this case states that a grant of unfettered discretion to an administrative body to limit a Charter right is not a law. This means that the Censor Board was not acting pursuant to legal authority (or pursuant to any law); and its actions, whether "reasonable" or not, were therefore ultra vires since they interfered with a Charter right. The Court of Appeal agreed with the Divisional Court's conclusion in this respect but stated the issue in slightly different terms:

> We would go further than the Divisional Court on this issue. In our view, s.3(2)(a), rather than being of "no force or effect" is ultra vires as it stands. This subsection allows for the complete denial or prohibition of the freedom of expression in this particular area and sets no limit on the Board of Censors. It clearly sets no limit, reasonable or otherwise, on which an argument can be mounted that it falls within the saving words of s.1 of the Charter: "subject only to such reasonable limits prescribed by law" (per Mackinnon, A.C.J.O.). (Emphasis added.)

The problem in the Censor Board case was that the statute did not establish any criteria upon which the Board was to act in censoring films. There was no question that the Board was statutorily authorized to infringe freedom of expression. The Act did not, however, structure the Board's discretion.

In striking down the statute as conflicting with section 52(1) of the Constitution, the Court of Appeal adopted the same kind of approach as did the Supreme Court of Canada in Hunter et al. v. Southam Inc. In this case, the Supreme Court refused to "read down" section 10 of the Combines Investigation Act (granting the Director of Investigations power to authorize searches) in order to prevent conflict with section 8(2) of the Charter. The Court held that a statute which conflicts on its face with the Charter is void: The courts will not write into the legislation appropriate constitutional safeguards.

Had the Censor Board's discretion been limited by the statute, the Court could still have accepted an argument that there was an infringement of the Charter; but in this case the issue would have proceeded to section 1. The Court would, in this event, have to determine whether the statutory limit on freedom of expression was "reasonable" and whether it was "prescribed by law". In order to meet the prescribed by law criteria established in the Sunday Times case, the statutory limits to the Board's discretion would have to be reasonably "precise". There would have to be reasonable clarity and precision to the standards applied by the Board in censoring films. The limits would also have to be "accessible". Limits expressed in a statute would satisfy this latter condition because statutes are public enactments. In this case, any action taken interfering with a Charter right would be prescribed by law so long as that action was intra vires the Censor Board's statutory grant of power. If the limits could also be shown to be "reasonable" and "demonstrably justified", section 1 would be satisfied.

There will be cases in which a statute makes a grant of power to a tribunal or agency but does not conflict "on its face" with the Charter. Instead, the infringement arises as a result of the actions of the subordinate agency. A statute might, for example, grant authority to an agency to issue licences to conduct certain activities which are potentially hazardous to the public. The statute may indicate a number of factors which the agency may take into account in order to protect public safety. The statute may also, however, leave some discretion to the agency to develop policy and to decide on a case-by-case basis whether licences should be granted. This discretion may be necessary because legislators cannot know all factors which are relevant to achieving the statutory objective.

Acting under such a legislative mandate, the agency may conclude as a matter of policy (or in an individual case) that a mentally disabled person should not receive a licence. The agency may come to this conclusion on the basis that public safety requires that licence-holders be mentally competent.

A person affected by such a policy or decision might bring a challenge under section 15(1) of the Charter. He could argue the case in either of two ways. First, he could argue that the Board's decision was ultra vires its statutory authority. He could argue that the courts should not, when interpreting the scope of a tribunal's authority, include within that authority the right to discriminate on a prohibited ground unless the statute explicitly grants such authority. The argument that would be made here is that the statute must prescribe mental competence as a relevant consideration to be taken into account by the Board in making its decision. It might be expected that a court would be reluctant to "read into" the statute authority to discriminate. A court might be particularly hesitant to read into the statute such authority if the agency's mandate is ill-defined or if its discriminatory practices are unpublished.

This argument does not require the court to strike down the legislation. It depends entirely on the court employing traditional techniques of statutory construction favouring individual rights, and using the doctrine of vires to control the jurisdiction (and therefore the discretion) of administrative bodies. If this argument were to succeed, the Board's actions would not be within its mandate and no "reasonableness defence" would be possible. The decision would be quashed as unlawful under the ordinary rules of administrative law.

The court may conclude, however, that the Board's decision was, in fact, within the authority granted to it. If so, the decision might still be challenged as infringing section 15(1). In this case, it might be argued that the tribunal's decision, although intra vires its grant of power, was not "prescribed by law" under section 1 of the Charter. Here, the argument would be the same as above: the statute must prescribe mental competence as a relevant consideration to be taken into account by the Board in making its decision. This argument would depend on the court accepting the argument that:

(1) The statute does not conflict on its face with the Charter. It does not explicitly authorize discrimination (and therefore it is unlike the Censor Board case).

(2) The statute implicitly authorizes the board to discriminate on the basis of mental disability through its delegation of discretionary authority.

(3) The board's decision is nevertheless not prescribed by law because the statute does not explicitly authorize discrimination.

If this argument is to succeed, some rationale for requiring that legal limits on Charter rights be explicitly stated in a statute must be provided. This rationale must be independent of arguments relating to the vires of the government action imposing the limit.

The following analysis suggests three alternative ways of viewing the "prescribed by law" requirement in section 1.

(c) The Approaches

Section 1's "prescribed by law" clause implicitly presupposes that there are two alternative states of affairs which can exist: either a limit on Charter rights is "prescribed by law", or it is not "prescribed by law". The following discussion outlines three options for identifying the line which separates these two alternative states of affairs.

The first option outlined accords limited significance to the phrase as a separate requirement apart from other qualifying language in the section. The other two, with varying degrees of emphasis, interpret "prescribed by law" as a two-fold guarantee:

1. that any actions of government claiming to limit rights conferred by the Charter must be ascertainable in the sense that the limits placed on individual rights are discoverable to an adequate degree of precision by those parties who are affected thereby; and

2. that the limits placed on a particular right must be the product of the legislature, which must make an electorally accountable decision to modify the apparent constitutional entitlement.

Under the foregoing criteria, limits on rights which are either the product of unstructured executive or administrative discretion and/or are simply too vague would not meet the requirement. It should be noted that this inquiry remains independent of the questions of reasonableness or demonstrable justification with respect to a section 1 claim.

The following approaches should be assessed in light of the Therens decision discussed above, especially with respect to the comments on the common law and the implication of a limit.

(i) Approach 1: Impugned government action must have an ascertainable legal mandate

By this first approach, a limit on Charter Rights would be "prescribed by law" so long as the impugned action can be traced to a lawful authority or basic legal mandate pursuant to which the government acted in the particular case. Approach 1 would allow for quite broad legislative mandates without any violation of the "prescribed by law" requirement, subject to a court ascertaining whether a particular Charter infringement lay within the mandate of the government official who undertook it. This approach is based upon three principle assumptions already recognized in Canadian law, having regard to the vires, or jurisdiction of the responsible government official as conferred by statute or common law.

First, the simple fact that the government official was given a discretionary power in widesweeping terms does not necessarily demonstrate that this discretion can be exercised so as to contravene the Charter. It is assumed that, following

Justice Rand in Roncarelli v. Duplessis, "no legislative act can, without express language, be taken to contemplate an unlimited arbitrary power, exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute."

Second, pursuant to the first proposition, any statutory power, whether discretionary or otherwise, may only be exercised by a government official in pursuance of the purposes for which the statutory power was delegated to that office. In the case of a power that is alleged to contravene a particular Charter Right, a court must identify, through an application of principles of statutory interpretation, the statutory purposes for which the discretionary power was delegated; a court determines whether the action of the public official is intra or ultra vires those purposes. An intra vires finding would mean the government claim limiting a Charter Right would be prescribed by law; an ultra vires finding would only state that the action of a government official was not prescribed by law by virtue of lying beyond the powers delegated to that official pursuant to the statute. The statute would not on its own terms be implicated by the ruling.

Third, the basic judicial presumption underlying the interpretation of the statute in question is that the legislature, when enacting the statute, did not intend that the power be exercised in a manner violative of any Charter guarantees, unless the legislature has manifested such an intention through clear language or necessary implication. This presumption accords with the traditional presumption of Canadian constitutional law that legislature does not intend its statutes to exceed the jurisdiction conferred on it by the constitution, absent clear language or necessary implication to the contrary.

Approach 1 gives content to the phrase "prescribed by law" in a manner that harmonizes well with pre-Charter precepts of Canadian constitutional and administrative law, and the practices of Canadian legislatures. Unfortunately, it also conflicts with the reasoning of the Ontario Divisional Court in the Board of Censors case. Moreover, the approach may be criticized as a limited interpretation of new constitutional language which does not necessarily direct legislatures any differently from the past.

(ii) Approach 2: A limit on Charter rights must clearly be prescribed by law

By this approach, a limit on Charter rights would only be "prescribed by law" if the enabling law indicated through clear language that the law was intended to confer a mandate to qualify a right which is now entrenched in the Charter. This approach rests upon a proposed principle of constitutional interpretation which would hold that a legislature shall not be taken to have authorized (i.e. "prescribed") any qualification of a fundamental right or freedom, enumerated in sections 2 to 23 of the Charter of Rights, unless such a legislative intent is manifested through clear legislative language.

Under approach 2, it would not be necessary for a legislature to always spell out in specific detail, every circumstance under which it authorizes a qualification of a Charter right. It need only generally indicate that the legislature is enabling a certain ministry or commission to encroach upon Charter rights, by reference to general standards included in the statute, the common law or indeed, administrative discretion in pursuit of a particular public policy. For example, the legislature could enable a ministry, responsible for providing public housing to make distinctions based on age, so long as the enabling legislation generally indicates that "in determining who is eligible for public housing under this Act the Ministry may have regard to age". It would then be up to the ministry involved to determine how much emphasis would be placed on age matters. Although this provision would still be subject to challenge under section 15(1), the limit on Charter equality rights would be "prescribed by law". It would then either stand or fall based on the reasonableness and demonstrable justification of this particular limit on equality rights.

A benefit of this approach is that it achieves two important objectives: first, it makes legislatures specifically authorize governmental actions which qualify fundamental constitutional rights. Second, it makes the existence of limitations on constitutional rights readily discoverable. The concern for legislative responsibility which Approach 2 attributes to the phrase "prescribed by law", explains its inclusion in the final draft of section 1 in addition to the phrase "reasonable limits" which appeared without this test in earlier versions.* Moreover, Approach 2 is far from heretical. It is appropriate to recall that "[t]he major concern of the [McRuer] Commission with respect to unjustified encroachment by institutions of government or bodies exercising governmental authority"* was:

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* The phrase "prescribed by law" did not make its appearance until the third of seven draft versions of the Charter which was submitted to the Special Joint Committee on the Constitution by Justice Minister Chretien on 12 January 1981. See Elliot, 14, 23, 24.

(1) The existence and exercise of powers to abrogate or vary the rights of an individual by unilateral action and without his consent;

(2) The existence and exercise of powers to determine authoritatively the rights of an individual by tribunals other than the ordinary courts of justice (McRuer Report, Report No. 1, 8).

Further, the responsibility model for "prescribed by law" may be viewed as an appropriately restrained judicial tool. Under this model, the courts ask first, whether the legislature has considered the possible impact of governmental action impacting on individual rights -- and tells our elected officials to do so if they haven't -- before making value judgments on why a government should perhaps be allowed to impose, albeit indirectly, the restrictions in question.

In terms of foreign analogies the acceptability under Approach 2 of the approach taken by the European Court of Human

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* It is well known that the McRuer Report resulted inter alia in the addition of an oversight committee of the Ontario Legislature to better supervise the process of subordinate law-making. See the Regulations Act, R.S.O. 1980, c. 446, s.12 Similar concerns at the federal level prompted passage of the Statutory Instruments Act S.C. 1970-71-72, c.38. Subsequently there has been growing concern with respect to its burgeoning quantity and problematic accountability generally. See e.g. Economic Council of Canada, Reforming Regulation (1981) Canada, Standing Joint Committee of the Senate and House of Commons, Report on Regulations and other Statutory Instruments 1st Sess. 32nd Parl. (1980).

Rights in the Sunday Times case, is problematic.*

The notion that a common law rule meets the test of "prescribed by law" because it is accessible (at least to lawyers) such that the consequences of non-compliance are foreseeable meets only the first requirement of the model. The issue of responsibility may not be as directly met under the Sunday Times test in any direct sense. A common law rule antedating the Charter may not be something the legislature has even thought about in the context of limiting individual rights. The fact that the actions of the Attorney General in Sunday Times may have been in accordance with judicial concepts of appropriate limits on free speech not heretofore subject to Parliamentary objection and therefore, possibly reasonable and even demonstrably justifiable in the circumstances, may not be sufficient under this approach. On the other hand, since the common law is in force and is ascertainable, the legislature's decision not to reverse it may be a sufficient exercise of responsibility to meet the second test established by this approach.

(iii) Approach 3: Limit must be prescribed by a precise legal rule, not a legal discretion

By this third approach, a limit on Charter rights is "prescribed by law" where it is specifically described in a law, and where the ambit of the limit is certain and not totally discretionary. Here, the emphasis is on precise discoverability and somewhat less on the responsibility requirement which underlies approach 2. The opposite of "prescribed by law" would be a situation where the limit is "prescribed by discretion". Whether or not such "discretion" is rooted in law is irrelevant. By this approach, the focus is on a requirement that the citizenry be able to know the precise scope of the limits on Charter rights.

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* For a discussion of the factual background of the case, see Mendes, 396-7. Mendes explicitly avoids any analysis of the term "prescribed by law" except to suggest that this wording in section 1 "reinforces the thesis that the Canadian Charter of Rights must be interpreted so as to conform to Canada's international legal obligations."

From the foregoing, it would appear that the requirement of precision would also satisfy all concerns of responsibility, since the legislation would have to spell out precisely what is wanted. On the other hand, reliance by an administrative official on a specific common law rule pertaining to his mandate (as equally specific for all practical purposes as similarly detailed legislation), could pass muster under approach 3. The rule would have to be sufficiently notorious to warrant a presumption that the citizenry would be taken to know the nature of its application to the conduct of the party against whom it is applied. One example might be the Sunday Times case, which runs afoul of approach 2 but may fit approach 3. Normally, under approach 3, a limit on Charter rights would have to be spelled out in enabling legislation in extensive detail. In the public housing example mentioned under approach 2 above, it would not be sufficient for the legislature to include in the enabling legislation a power for the Ministry to "have regard to age" when determining who is eligible for housing. It would be necessary for the specific ways in which age may be considered in determining eligibility for public housing to be spelled out in the legislation.

Under this approach the Theatres Act and provisions governing the censorship of films might not be "prescribed by law". This is because the Theatres Act does not specifically indicate on what basis films may be cut by the Censor Board. Responsibility may be there but specificity is not.

Implications of the Approaches

The major distinction between approaches 2 and 3 comes down to a difference in emphasis since the dual requirements of ascertainability and responsibility are likely to be present in both cases. Neither characteristic is absolutely essential under approach 1 which basically treats the phrase "prescribed by law" as a reference to canons of statutory interpretation, although limits on specific Charter Rights are restricted to the extent that the legislature is presumed to intend a conformity with the Charter unless it manifests a different intent. Approach 1 suggests an efficacious interpretation of the phrase which may constitute a preferred course most in harmony with the realities of modern government. Approach 2 takes a rigorous view of direct responsibility for government action that affects constitutionally protected individual rights. Approach 3 avoids the problem of responsibility only if settled rules of limitation, such as a clear common law rule, exist in the absence of legislative advertence. In most cases, however, approach 3 would impose the greatest prescriptive burden on government to spell out what it is doing in all instances. Accordingly, to the extent Charter Rights are implicated thereby, approach 3 would serve to cut back on administrative decision-making that arguably remains an indispensable workhorse of modern government. As such, approach 3 may constitute an extreme view.

SUMMARY OF PAGES 186-188

4. The Requirement of "In a Free and Democratic Society"

Discussion of the application of this requirement, indicating that courts have accepted that Canada is a free and democratic society and that Canadian practice supersedes practice in other countries.

Brief discussion of international treatment of the phrase "democratic society" in the international context where external standards are applied to determine whether or not a practice is consistent with democratic process.

4. The Requirement of "In a Free and Democratic Society"

This phrase can be interpreted as requiring or permitting an abstract inquiry into the components of a free and democratic society or as inviting a comparison with other countries commonly considered to be "free and democratic societies", or can be interpreted as permitting both approaches. For the most part, the courts have made the comparison with other countries and have generally accepted that Canada is a free and democratic society (Rauca, Quebec School Case (Que. Sup. Ct.), Southam (accessibility to juvenile trials case). In making the comparison, the courts have usually been willing to consider the practice in other jurisdictions. The Ontario Court of Appeal in Global Communications Limited v. State of California (1984), 44 O.R. (2d) 609 (per Thorson J.A.), an extradition case, stated that the Court could not base its decision solely on the experience of other countries but must return to Canadian experience. In other words, the limit must be justified in relation to Canadian practice, regardless of practice in other jurisdictions.

In R. v. Videoflicks, Tarnopolsky J.A. suggested that a mere enumeration of the practice in other jurisdictions might not be adequate. The government must show why the limitations in other jurisdictions are reasonable and justified. He distinguished the other jurisdictions referred to in that case in various ways:

> Although there may be instances where such bare analogies might be sufficient proof to meet the requirements of s. 1, they are certainly not sufficient in this case. As far as other provinces are concerned, it must be kept in mind that all of this legislation was enacted before the coming

> into force of the Charter. As far as the United States is concerned, not only do many state statutes provide for Sabbatarian exemptions (see Appendix II to the opinion of Frankfurter J. in McGowan v. Maryland, supra), but, as pointed out earlier, the United States constitution does not have a provision like s. 27 recognizing cultural pluralism as a constitutional principle nor a provision like s. 1 which recognizes that the rights and freedoms are "subject only" to certain specified reasonable limits. Neither the United Kingdom nor New Zealand has any constitutionally entrenched protection for freedom of religion. Although Australia and Japan do have such protection, they also do not have the equivalent of ss.1 and 27 of our Charter.

If Mr. Justice Tarnopolsky's approach to "in a free and democratic" society is approved by the Supreme Court of Canada or not disproved and applied by other courts in the future, it may result in a more thorough inquiry under the "free and democratic society" requirement than has often been the case to date.

In the international context, "democratic society" has been defined in relation to external standards or principles. The phrase appears in the European Convention on Human Rights and Fundamental Freedoms in the specific limitations attached to various rights. It has been interpreted as follows:

> The hallmarks of a 'democratic society' are pluralism, tolerance, and broadmindedness. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. (Sieghart, 93)

Under the Charter, the courts have not assessed the limits before them by setting them against these or similar principles but rather have assumed that since jurisdictions which have such limits are considered to be democratic, that the limits are consistent with "a free and democratic society". Evaluation in light of a set of external principles would put more content into the "free and democratic society" aspect of section 1, although it could also lead courts to make extensive value judgments.

SUMMARY OF PAGES 191-213

B. Understanding Section 15

Eight topics are discussed in relation to section 15:

1. The meaning of "equality";
2. The equality rights guaranteed by section 15:
    - (a) the number of rights
    - (b) the status of "equal before and under the law";
3. The role of the anti-discrimination clause;
4. The meaning of "discrimination":
    - (a) whether the term is implicitly qualified
    - (b) whether it refers to "constructive" discrimination;
5. The treatment of the enumerated grounds;
6. The treatment of non-enumerated grounds;
7. Section 15(2) as a defence and as a remedy;
8. The effect of section 28.

1. The meaning of "equality"

Equality is defined as equality of opportunity.

It is proposed that equality does not mean treating all individuals in the same way but recognizing differences and treating people situated differently in different ways.

As well, there is a discussion of whether section 15 includes economic rights. It is suggested that it does not include economic equality as such. This view is supported by reference to the nature of the Charter generally, the nature of the Canadian system, Canadian obligations under international law, interpretation of section 6 of the Charter by the Supreme Court of Canada, treatment of economic rights by the Joint Committee and caselaw to date dealing with sections other than section 15. Under this view the Charter may have indirect economic effects.

B. Understanding Section 15

1. The Concept of Equality

Fundamental to an understanding of section 15 is an appreciation of the scope of the equality guarantee. This paper cannot pretend to exhaust all the possible meanings of equality which might be attributed to section 15. However, it can set out a likely interpretation, based on general notions of equality in Canadian society as a whole and on the terms of the Charter itself. On the basis of such notions, it is possible to understand in general terms the kinds of interests which are likely to be recognized by the courts as coming within the equality guarantees of section 15. Without some understanding, albeit incomplete, of this fundamental issue, it is difficult to ascertain the anticipated effect of section 15.

In brief, the major position set out here is that the purpose of the Charter, including section 15, is to protect and enhance substantive rights. However, it is possible that not all kinds of rights are protected. The Charter may be characterized as guaranteeing legal and political rights, but not economic rights (which may come into play indirectly). This can be deduced from an examination of the rights and freedoms other than section 15. Furthermore, the kind of equality guaranteed by section 15 is related to opportunity rather than equality of result. Nor, it can be argued, does section 15 promote absolute equality (treating all people in the same way), but rather, an equality which recognizes that under certain conditions (in order to give effect to people's differences), different treatment may be necessary to the promotion of equality.

On the major view expressed here, it is the interplay between these various aspects of equality which helps to achieve a balanced section 15. Equality rights in the Charter appear to focus on equality of opportunity in regard to non-economic resources or benefits; but that right to equality may acquire an extensive application through a prohibition against constructive discrimination and a positive response to differences.

(a) Section 15 Guarantees Equality of Opportunity

Equality of opportunity has characterized equality in liberal-democratic states such as Canada for over a century. Although it is a view held by theorists on both the right and left, the role each would assign to the state marks a major distinction between them. Theorists on the right are reluctant to permit the state to intervene in enhancing freedom of opportunity. They argue that while barriers should not be erected to prevent members of society from exercising their opportunities, neither should the state intervene to destroy existing barriers. Theorists on the left, on the other hand, consider that if equality of opportunity is to have any meaning for the "aspirant groups" in our society, such as the disabled, women, native people and the elderly, a broad conception of equality of opportunity is necessary:

> The difficulty is that the most intransigent problems of inequality are unlikely to be resolved satisfactorily for most aspirants if goals are set within the equal opportunity mode unless equality of opportunity is understood broadly enough to include some obligation on the part of the state and governments to act to achieve [an] 'over-all balance of burden and benefits'.
>
> ...

> Somewhere between the theoretical extremes of the state as a neutral arbitrator of a fair-play game and as the realizer of absolutely equal shares is an understanding of equality which recognizes that the achievement of an overall balance of burdens and benefits requires a recognition of different needs within a broad framework of equal rights. (Vickers, 57)

The "recognition of different needs" accepts that we may have to treat some persons "unequally" -- that is, differently -- in order to enhance equality. Indeed, treating all people in precisely the same way may perpetuate historic inequality since disadvantaged persons may not be able to take advantage of such treatment.

Put another way, it has been an important tenet of "liberal-democratic" theories that certain differences among people should not matter. Originally, these were immutable differences such as race; more recently, near-immutable characteristics or characteristics which are not easily changed have been included among these "protected" grounds. However, sometimes differences do matter. They need to be recognized in order to overcome them or to take them into account. According to this approach, differences should be acknowledged when positive action can diminish the negative social effects of a particular condition, yet differences should not negatively interfere with our assessment of individual merit. For example, we should both ignore and recognize physical disability when providing education. In assessing the individual's intellectual ability, the physical disability should not form one of the criteria. Actual enjoyment of the right, on the other hand, might require explicit acknowledgement of the disability in order to make appropriate architectural changes allowing that person access to the facility. Subsection 15(2) allows governments to make such changes; section 24 may permit a court to require the government to make such renovations. Sections 15(2) and 24 are discussed elsewhere in the paper in greater detail.

The effect of interpreting section 15 equality as equality of opportunity is that equality in the Charter is not meant to encompass equality of result. The Charter is not designed to revamp our legal, political or social system.* All that the Charter seems to require is that people have a fair chance to benefit from whatever government offers. It does not demand a redistribution of resources.

It can also be argued that a full appreciation of equality of opportunity demands that it include a prohibition against constructive discrimination since many examples of inequality are not intentional. Appreciation of the present effects of past discrimination would help to improve current equality of opportunity. Constructive discrimination is discussed in detail below (pp.256ff.).

(b) Section 15 Recognizes Different Needs

Recognizing special needs means that we cannot treat the concept of equality as "absolute equality" which is satisfied by treating all individuals in the same way. The Report of the Abella Commission on Equality in Employment states that "[s]ometimes equality means treating people the same, despite their differences, and sometimes it means treating them as equals by accommodating their differences" (Abella Report, 2). Given the historical treatment of certain groups in our society, "neutral" equality -- one which ignored differences for all purposes -- would result in a further gap between such groups and the majority; this is similar to increasing wages on a percentage basis: the measure is neutral but the effect is to widen the gap between the higher and lower paid workers. Dickson J. (as he then was) stated in the context of religious freedom in Big M Drug Mart that "the interests of true equality may well require differentiation in treatment" (p.527).

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* Nevertheless it should be remembered that how it is employed will determine how radical its effects are, not its intended purpose. For example, the Big M Drug Mart Supreme Court decision has significant implications for a redefinition of the religious aspect of our society.

The idea that effective equality cannot be "blind" has been best developed in relation to gender equality but it can be applied to other groups, as well, such as the disabled. As applied to women it requires that the needs specific to women are taken into account; primarily these needs relate to pregnancy and child-rearing. This was the view articulated by the Report on the Status of Women nearly fifteen years ago (Report on the Status of Women, xii; as expressed in one member's minority opinion "neutrality is not enough", 421). A concept of equality which ignores this set of needs is not going to respond adequately to women's claims for equality.

Until recently, the major approach to women's rights has been to stress that men and women were in many ways similar. However, much of the work in this area now argues that we should explicitly take differences into account in order to respond appropriately to them. It should be emphasized that such a recognition does not require different legislation on the basis of sex. A "neutral" rule may be formulated which applies to both sexes but which encompasses the relationship of women to childbirth and child care. For example, legislation may require child care leave for employees with primary child care responsibilities. The provision would be available to both women and men but would, at this stage of development, be taken advantage of more by women than by men.

Both constructive discrimination and affirmative action recognize this non-absolute sense of equality. Constructive discrimination acknowledges that the failure to respond to particular special needs or characteristics may have had negative consequences. Affirmative action is a tool for remedying the disadvantages consequent on ignoring special needs and characteristics.

(c) The Charter Does Not Guarantee Economic Equality

Although the concept of equality of opportunity can be interpreted broadly to encompass affirmative action and a prohibition against constructive discrimination, that wide definition is balanced in the Charter context by its restriction to guarantees of political and legal equality. The Charter does not appear to be directly concerned with the redistribution of economic goods and resources.

Having a job is an economic consideration, although not necessarily an economic right. Thus one cannot use the Charter in order to claim the right to a job or to employment; it does not appear that the Charter is available to ensure the provision of employment opportunities. But, once employment opportunities have been established by the government, the Charter does require that they be available to all applicants without discrimination. Similarly, the Charter does not appear to guarantee the right to work nor the right to free medical care; what it does appear to guarantee is that if the right to work or the right to free medical care is independently established (that is to say it is established outside the confines of the Charter), the Charter guarantees that those rights be available to all persons without discrimination. In this sense then, economic rights or benefits may be extended to persons who do not now enjoy them. The Charter does not require the establishment of economic rights, but it does require that once those economic rights are established, they must be established fairly.

In his discussion of civil liberties, Professor Hogg adopts the classification by Professor Bora Laskin (as he then was) which divides civil liberties into political liberties, legal liberties, economic liberties and egalitarian liberties (Hogg, Constitutional Law, 417). Economic liberties are defined as freedom of private property and contract while egalitarian liberties, "often the antithesis of the economic liberties", consist of "the claim to equality of access to education, employment, accommodation, and other benefits, and implying at least, an absence of racial, sexual or other illegitimate criteria of discrimination". As Professor Hogg points out, the economic freedoms of property and contract "which imply a power to deal with whomever one pleases, come into direct conflict with egalitarian values" and through human rights legislation the egalitarian values have taken precedence. The egalitarian rights may have an economic context to them, but only in the sense that government cannot discriminate in the distribution of economic benefits.

In this sense it is important to understand that it is only insofar as one refers to egalitarian values as the absence of discrimination, that one may in fact lay any claim to economic rights. In other words, the "right" or entitlement to economic benefits, such as unemployment insurance benefits, derives from the anti-discrimination right. It does not stand as a free-standing right. It is interesting to note that when Professor Hogg discusses the Canadian Bill of Rights, he deals with political, legal and egalitarian civil liberties but not with economic civil liberties. There are no economic civil liberties in the Bill of Rights, except the right not to be deprived of property without due process of law. Of course, we are not restricted to the framework of the Bill of Rights when interpreting the Charter, but one can come to the same conclusion on the basis of the examination of the Charter as a whole, that only civil, legal and with respect to Hogg's classification, the egalitarian civil liberties (that is, the anti-discrimination right) are present in the Charter (Hogg, Constitutional Law, 440).

(i) This interpretation is consistent with the Canadian approach to human rights and the Charter generally

This treatment of economic rights by the Charter is consistent with the general Canadian approach to human rights. For example, Canada supported the policy of having two separate International Covenants, one on civil and political rights and one on economic, social and cultural rights (see above pp.59-60)*. Economics is not an articulated part of our human rights law. As Professor Tarnopolsky pointed out in regard to the International Covenant on Economic, Social and Cultural Rights, "the problem in converting such economic civil liberties into legal values enforceable in the courts are probably insurmountable. Rather than appearing in Bills of Rights they must form part of political platforms, and their enforcement will have to be by ballot" (Tarnopolsky, Canadian

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* Article 1 of the International Covenant on Civil and Political Rights states:

> 1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 1 may be referred to to support the view that the Political and Civil Covenant commits Canada to some guarantee of economic rights. However, Article 1 uses the term "peoples" in the national sense, not in the individual sense. Article 1 refers to autonomous activities or rights which arise out of the right of national self-determination. It does not guarantee individuals the right to pursue their economic development, etc. It is therefore difficult to apply Article 1 to the context of protecting individual rights under the Charter.

Bill of Rights, 219-220). This is one area in which the Charter is not different from the Bill of Rights. Pierre Elliot Trudeau made the same point in an early consideration of a Charter of Human Rights. He said that the objective of economic rights was "desirable and should be an ultimate objective for Canada" but that it must be put aside now in order to concentrate on political, legal, egalitarian and linguistic rights. He defined economic rights as "those which seek to ensure some advantage to the individual and which requires positive action by the state" (Trudeau, 116).

It has been suggested that there might be an economic right component in section 7 of the Charter. In Canada (Eve Studio), et al v. Winnipeg, [1984] 4 W.W.R. 507 (Man. Q.B.), a case involving the validity of a by-law regulating massage parlours and dating and escort services, Morse J. rejected the plaintiffs' arguments that the by-law offended section 7 of the Charter, saying:

> Although private rights are not specifically protected by the Charter, it is conceivable, I think, that a person might be so deprived of his property or economic interest that his right to security of the person, if not his liberty, could be said to have been violated. However, the evidence does not, in my view, establish such a deprivation in this case.

However, a different view was taken by Kroft J. in Gershman Produce Co. Ltd. v. The Motor Transport Board (1985), 14 D.L.R. (4th) 722 (Man. Q.B.) which involved a challenge to the procedures of the Board under sections 7 and 8 of the Charter. Although His Lordship considered that section 7 should not be narrowly construed to refer only to arbitrary arrest or imprisonment, he said in obiter "I can find no intent within the words of s.7 of the Charter to protect so-called 'commercial' or 'economic' rights".

Thus certain rights or freedoms may have economic consequences or ramifications but those consequences are not the reason the right or freedom has been included in the Charter. For example, freedom of association has been argued in support of the right to form a union. In the Inflation Restraint Case, the Ontario Divisional Court held that section 2(d) guarantees the right to form a union, to bargain collectively and to strike, the last being a corollary right necessary to make the first two effective and not merely symbolic. The Ontario Court of Appeal did not find it necessary to rule on any matters arising under the Charter and therefore neither approved nor disapproved this interpretation of section 2(d).

The Saskatchewan Court of Queen's Bench, however, held that the right to strike is not a fundamental freedom. The Dairy Workers (Maintenance of Operations) Act took away the dairy workers' right to strike for a limited period of time. In the Dairy Workers Act case, Sirois J. stated:

> The right to strike is not a fundamental freedom; it is not as wide sweeping as that. It is applicable in a particular context, in particular types of associations and under certain circumstances. It is expressly limited by laws in cases of national emergency, essential services, national security and when at times irreconcilable labour disputes arise.

His Lordship then considered the circumstances of the breakdown of negotiations and other problems and concluded "I do not see how [the Act] could be said to violate s.2(d) of the Charter and I find that it does not".

The right to strike was also considered in Public Service Alliance of Can. v. Canada (1983), 9 C.R.R. 248 (F.C.T.D.) (appeal to Federal Court of Appeal dismissed (1985), 55 N.R. 285) which was concerned with a prohibition against strikes for two years. Reed J. stated

> "freedom of association" guarantees to trade unions the right to join together, to pool economic resources, to solicit other members, to choose their own internal organizational structures, to advocate to their employees and the public at large their views and not to suffer any prejudice or coercion by the employer or state because of such union activities. But it does not include the economic right to strike! (emphasis added)

In dismissing the appeal, Mr. Justice Mahoney, Mr. Justice Hugessen concurring, stated that "[t]he right of freedom of association guaranteed by the Charter is the right to enter into consensual arrangements. It protects neither the objects of the association nor the means of attaining those objects". Mr. Justice Marceau also held that the term "freedom of association" was not broad enough to include the right to strike, however liberally it was interpreted. Both Mahoney J. and Marceau J. adopted the views expressed by the British Columbia Court of Appeal in Dolphin Delivery Ltd. The Court of Appeal held that freedom of association does not protect picketing.

The Newfoundland Court of Appeal found in Re United Association of Plumbing Industry and Pitts Construction Ltd. (1984), 7 D.L.R. (4th) 609, that a prohibition against secondary picketing did not contravene sections 2(b), (c) and

(d) of the Charter. It did not consider the issue in any detail but stated that the relevant section of the legislation did not restrict rights:

> ...s.124(1) was not intended to, nor does it, restrict the recognized right of labour to bring economic pressure to bear on the employer by peaceful picketing. The restrictions placed on that right by s.s.(2) of that section give statutory effect to the common law right of other employers to seek redress against any person from procuring or inducing a breach of contract or from injuries caused them by persons acting in combination or concert.

The Alberta Court of Appeal also held in Reference re Public Service Employee Relations Act that an explicit prohibition against striking by specified public servants did not infringe the guarantee of freedom of association under the Charter. Kearns J., three other members of the Court concurring, stated that protected organization does not necessarily include protected action. He commented in obiter that

> the entire field of economic association offers difficulty. Why is there a right of association for economic purposes when the Charter apparently offers no other economic rights?

Belzil J. in a concurring opinion, dissenting in part but not on this point, set out three classes of rights, one of which he called "welfare rights". This class of rights

> derives from benefits granted by the state to its subjects, viz., workers' compensation, pensions, old age assistance. Subject to the protection of equal treatment contemplated by s.15(1) when it comes into force, what the state has granted the state may take away. Like societary rights [which

> includes "the right of people to rise up against tyranny, the right of workers to strike against oppressive conditions of work, the right of self defence"],* welfare rights are not in the same class as fundamental freedom [sic].

And later:

> the right to strike in support of collective bargaining, whatever it may be, is not a fundamental freedom guaranteed by s.2(d) of the Charter under the rubric of freedom of association. It is a right conferred by legislation, and, as in the case of welfare rights discussed above, what legislation has conferred, legislation may modify or abrogate.

The predominant view in the cases is that economic association is merely an incidental outflow of the general freedom of association but does not extend to guarantee the right to strike.

Section 6 contains the right to pursue a livelihood but it is conditioned on the question of mobility, not on the economic right to work. The section 6 rights are called "Mobility Rights", not "Economic" or "Livelihood Rights". Indeed, the mobility rights have been criticized as not going far enough. It was suggested by some witnesses before the Joint Committee that mobility of capital and services also be included in section 6 because, according to one witness before the Joint Committee, the existing section 6 does not emphasize sufficiently the economic union character of the Charter (Joint Proceedings, 34:56; also see the submission of the Business Council on National Issues, 33:133-154). This comment reflects the speaker's belief that the Charter did not adequately provide for economic rights.

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* Belzil J. considered that societary rights may also include the legal rights protected by sections 7-11 of the Charter, apparently because "[t]he right to a fair trial presupposes legal proceedings". He appears to believe that government could more easily justify an infringement of legal rights than of other rights because the courts would permit a wider range of limits to such rights than others.

It has been contended, on the other hand, that paragraph 6(2)(b) includes the free movement of capital and goods, since they are employed by a person "to pursue the gaining of a livelihood in any province" (Binavince, 356). Another argument for economic content in section 6(2)(b) is that it is directed primarily at individuals entering the marketplace in order to undertake economic activity. According to this argument, the core purpose of section 6(2)(b) is to protect constitutionally the right to undertake a certain kind of economic activity free from a proscribed range of majoritarian action. That freedom of activity contributes to Canada's common market in labour. The maintenance of this particular economic regime was of sufficient importance to the drafters of the Charter that section 6(2)(b) is not susceptible to the section 33 override.

In Skapinker, the Supreme Court of Canada, analysing the construction of section 6, concluded that "s.6(2)(b) is directed towards 'mobility rights', and was not intended to establish a free standing right to work". Section 6 appears to be designed to permit labour and perhaps capital to move according to market requirements; it does not guarantee anything to any individual once that has occurred. Section 6(2) is an "anti-balkanization" section, not an individual right to work section. In a case decided prior to the Supreme Court of Canada decision in Skapinker, the Federal Court of

Appeal had held in Re Demaere and The Queen (1984), 11 D.L.R. (4th) (193) that "it would be strange indeed to find anything so revolutionary as a constitutionally guaranteed right to work buried in a subparagraph of a section whose principle thrust ...is mobility rights" (per Hugessen J.).

Sections 23 and 17-20 can be interpreted as imposing on government a specific duty to allocate society's resources for the benefit of particular groups. Section 23 creates a right to minority language education where numbers warrant. Section 23(3)(b) provides that, where numbers warrant, minority language education is to be funded from public funds. This means some redistribution of resources. Similarly, the constitutional guarantee of bilingualism in Canada and New Brunswick requires the allocation of resources to provide the services, although no specific provision is made in the sections as there is in section 23. In both these cases, the redistribution or allocation of resources derives from a non-economic right. The language rights are made effective by providing the funding to implement them. But the provision of funding is contingent on satisfying the requirements of the sections. This is explicit in section 23 where public funds are available only where numbers of children entitled to receive minority language education warrant and is implicit in sections 17-20, particularly section 20(1)(a) which contains the requirements of "significant demand" for and reasonableness of the provision of minority language services in Canada.

The affirmative action provisions of subsections 6(4) and 15(2) have an economic component. These do not give or recognize rights as much as they preclude possible restrictive interpretations of subsections 6(2) and (3) and 15(1), respectively. These sections do not guarantee economic rights which can be enforced; rather, they state that voluntary action by government or action undertaken to comply with a remedy ordered by the Court to improve economic conditions of certain persons is not to be viewed in itself as a denial of the mobility or equality rights of other persons. Economic disadvantage is referred to explicitly under section 6(4). It may be argued that it is included implicitly under section 15(2) on the basis that it expressly refers to "disadvantaged groups".

Similarly, the exercise of the section 15 equality rights may involve economic questions, but they are not rights to economic equality. Thus blacks could not be required to pay higher taxes than non-blacks: but that is because section 15 prohibits discrimination on the basis of race, not because it guarantees a right to equal taxation. The groups which are listed in section 15 constitute a significant portion of Canada's poor and low income residents. For example, one of the reasons mental and physical disability were added to the list may have been that Canada's handicapped population is seriously economically disadvantaged. It can be argued that the addition of disabled persons to the enumerated groups was intended to cause governments to allocate more resources to the handicapped when designing and implementing social and public policy. The same is true to some degree of all the minorities listed. Section 15 may have the effect of improving the economic status of these groups but as a consequence of improved access to benefits and opportunities, not as a result of claims made for economic equality itself.

It has also been argued that the word "benefit" in section 15 may indicate that section 15 is intended to have direct economic content. This view is based on the argument that "equal benefit of the law" was included in section 15 as a response to the Supreme Court of Canada's decision in Bliss v.

A.G. Canada, [1979] 1 S.C.R. 183. The particular benefits at issue in Bliss were economic, specifically unemployment insurance benefits. This interpretation might be stronger if the word "benefits" were used in section 15, rather than "benefit". Nevertheless, the phrase will no doubt produce claims to the provision of various income support payments without discrimination. This result would be quite consistent with the approach set out here. This approach suggests that nothing in section 15 appears to permit a plaintiff to demand unemployment benefits if the government does not offer them; but it does provide the basis for a claim that once the government decides to offer unemployment insurance benefits, it cannot refuse them on the basis of any of the protected grounds.

(ii) The Joint Proceedings

Discussion of the treatment of the right to property and the right to certain social and economic benefits before the Joint Committee indicates that the Charter was not intended to grant economic rights. They also indicate the kind of rights which are generally considered to be economic. The federal government removed from its initial draft of the Charter the right to enjoyment of property because the provinces were concerned that property rights would seriously impinge on their property jurisdiction. Although property rights are recognized by the Bill of Rights, that document applies, of course, only to federal legislation. The federal government explained that "property rights should be developed in the Charter of Rights" and when the provinces are able to devise an appropriate guarantee, "that ought to be in the constitution on that subject" (Joint Proceedings, 41:12). A proposed amendment to section 7 to include the right to "enjoyment of property" was defeated (Joint Proceedings, 44:12, 46:30). Although the federal government had indicated it would support the section 7 proposal, it subsequently refused to do so because of lack of unanimity in the Joint Committee and continued provincial opposition to the inclusion of property rights (Joint Proceedings, 43:61, 45:10).

It was pointed out that Article 17 of the Universal Declaration of Human rights guarantees the right to own property and not to be arbitrarily deprived of it (Joint Proceedings, 46:26). The government took the position here, as elsewhere, that Canada's international obligations do not require entrenchment of the international human rights principles in a constitution: "The Covenant merely obliges parties to take steps to progressively achieve the full realization of the Covenant rights by appropriate means, including legislative measures" (Joint Proceedings, 49:70, 36:13). The government's view was that international law principles "could be implemented in the charter,...in...federal or provincial legislation, or...by other regulation or by direction, or by practice" (Joint Proceedings, 41:15).

The Canadian Council on Social Development asked that "social rights be entrenched in the Canadian Constitution", including the right to employment, to healthy and safe working conditions, "the right to an adequate standard of living with access to the necessities of life", and the right to social security and social insurance, inter alia (Joint Proceedings, 19:31). A member of the Joint Committee noted the distinction between the kinds of rights advocated by the Council and those entrenched in the Charter: he said that the Council's brief showed

> the conceptual limitations of the constitutional proposals which the Committee is considering...by distinguishing

> between...a constitution which merely outlines the limitations of the state, and a constitution which would outlined [sic] the responsibilities of the state to its citizens, particularly with regard to social and economic needs.... (Joint Proceedings, 19:36.)

An amendment to add "lack of means" to the list of enumerated grounds in section 15 was withdrawn because there would be another amendment to that effect (Joint Proceedings, 47:89, 48:18). A subsequent proposed amendment to the equalization clause (s.36 of the Constitution Act 1981), was intended to implement the terms of the International Covenant of Economic, Social and Cultural Rights as well as "the goals of a clear and healthy environment and safe and healthy working conditions" (Joint Proceedings, 49:65). The reasons for this proposed amendment again highlight the nature of the Charter as a legal and political rights document rather than an economic rights document:

> These are fundamental concepts that we are talking about here. We are talking about a Charter of rights and freedoms, a statement of the values of Canadians, which is going to guide us as we enter the next century, and surely that should not just include civil and political rights. It should also recognize the economic and social rights which we recognize in any other statements of fundamental human rights including the Universal Declaration on Human Rights and the International Covenants to which Canada is a signatory. (Joint Proceedings, 49:71.)

The motion to include economic rights was defeated 22 to 2.

It is evident that the witnesses before and members of the Joint Committee and the government were well aware of the distinction between civil and political rights on the one hand and economic rights on the other and that the majority of the members intended that the Charter guarantee only the former. The right to property appears to have been the only economic right to have had any serious chance of inclusion in the Charter. Even then, it is not clear that this would have done any more than continue in the Charter the right to enjoyment of property in the Bill of Rights, expanded to the provinces, although it would have been subject to interpretation. What is very clear is the widespread reluctance to include economic rights other than traditional property rights.

If equality is broadly defined in the sense set out above (as predominantly civil and legal as limited to equality of opportunity, and takes into account that persons who are situated differenly might have different needs), the kinds of groups which are recognized by the courts and added to the protected grounds will be less likely to include groups which are specifically and directly based on economic considerations. As explained above, there is nothing in this interpretation of the meaning of equality in section 15 which prevents groups which are enumerated or which might otherwise be recognized by the courts from bringing claims which have economic repercussions. It simply means that the Charter would not be available to plaintiffs who wish to use it as a major vehicle for distributing wealth, property, and resources in Canadian society. This would include the wealthy who wish to redesign our taxation system and the poor who wish to extend income redistribution policies.

There is some concern that if the Charter is characterized as primarily a political and legal rights document, the courts might impose a more lenient standard on government when limitations affected economic interests than when they affected political and legal interests. For example, it is argued that a government could never justify a denial of women's access to the justice system but could more easily justify a denial of a particular welfare benefit to women. However, the denial of welfare rights on the basis of sex is a clear infringement of the guarantee of "the equal benefit of the law" and of equality generally under section 15. It is the legal right which is being infringed. In this example, it happens to have an economic content, but the test for justifying the denial must be the same whether it has an economic, political or other content. This approach is not intended to attribute any lesser value to a denial of the guarantee of equality because of the particular nature of the benefits denied.

It can be argued that a certain economic condition is almost a prerequisite to the enjoyment of political and legal rights. Thus the desire to appease hunger is likely to override one's desire to speak out on "abstract" political issues (although those "abstract" issues may well be related to one's hunger). Similarly, a certain level of education may ease one's ability to manipulate the political system to advantage or to make it easier to claim one's rights -- to know the right channels, for example. However, as Tribe points out in the context of the U.S. Constitution:

> the affirmative governmental duty to meet basic human needs cannot always be enforced directly...Instead it will usually be necessary to reflect affirmative duties less directly -- through governmental obligations to provide various procedural safeguards when the deprivation of welfare, wages, or household goods is involved; governmental responsibilities to determine eligibility for welfare and other basic services in terms of need rather than through such unrelated criteria as duration of residence

> or composition of family; and governmental duties to determine need with substantial accuracy. (Tribe, 919-920)

As Tribe indicates, if government were to wash its hands of the poor completely, there would be no recourse through the courts. However, government today does make some commitment to easing the plight of the poor. Having undertaken that, it is required to do so without discrimination. It is this protection which is guaranteed by section 15.

SUMMARY OF PAGES 217-225

2. Equality rights guaranteed by section 15

(a) The number of rights

The issue is the number of distinct equality rights.

(i) Approach 1: Section 15 guarantees one broad right to equality

This view argues that the inclusion of various forms of equality is meant only to ensure that the term equality is interpreted broadly and that certain interpretations under the Bill of Rights would not be imported into Charter jurisprudence, specifically the decisions of Lavell and Bliss.

(ii) Approach 2: There are two rights

This view would hold that there is a right to "equality before and under the law" (one right) and a right to "the equal protection and equal benefit of the law" (second right).

Supported by the heading "Equality Rights".

(iii) Approach 3: There are three rights

This view would hold that "equal before and under the law" is one right, the right to the "equal protection of the law", a second right and the right to "the equal benefit of the law" is the third right.

Supported by the heading "Equality Rights".

(iv) Approach 4: There are four rights

This view would read into "equal before and under the law" the word "right" with the result that there would be four rights guaranteed by section 15: the right to equality before the law, the right to equality under the law, the right to equal protection of the law, and the right to equal benefit of the law.

Supported by the heading "Equality Rights"

Implications of the Approaches

Treating the right as a general right would likely have the effect of granting the broadest equality right to plaintiffs while separating the rights would likely result in a narrower interpretation of the meaning or scope of each right. However, separating the rights could more easily grant a broad, almost unrestricted meaning to "equal before and under the law" (see the next section).

(b) The status of "equal before and under the law"

Issue is whether the phrase constitutes a free-standing right.

(i) Approach 1: Equal before and under the law is a right or rights

This view would treat the phrase as constituting an independent, free-standing right upon which a claim would be made.

(ii) Approach 2: Equal before and under the law as a statement of legal status

This view holds that the words do not constitute a separate right but indicate the context in which the right to equal protection and equal benefit of the law applies, that is, to the administration and to the content of the law.

Implications of the Approaches

It may be argued that if the phrase constitutes a free-standing right, it can be separated from the anti-discrimination clause and individuals who cannot show that they have been disadvantaged by a proscribed ground of discrimination, would nevertheless be able to make claims under section 15.

2. Equality Rights Guaranteed By Section 15

Section 15 speaks of four different kinds of equality. What appears to be a surfeit of equality may be primarily an attempt to prevent, before it occurs, a repeat of the narrow interpretation given equality under the Bill of Rights. In the previous section, we looked at that question from the point of view of "equality" as a concept; in this section, we consider the legal status of the various references to equality: how many equality rights are there? and, does "equal before and under the law" constitute a right or a statement (declaration) of legal status?

(a) The Number of Rights

Section 15 can be viewed as guaranteeing one broad right to equality or as guaranteeing two or more specific and separate equality rights. Each possibility is set out below.

(i) Approach 1: Section 15 guarantees one broad right to equality

Perhaps the easiest and most useful way to view section 15 is that it guarantees one right to equality, rather than a number of equality rights. On this view, the inclusion of specified forms of equality is meant only to ensure that the equality guaranteed by section 15(1) is interpreted broadly. It is not necessary to break down section 15(1) into its component parts and determine whether a particular infringement is an infringement of the equal benefit of the law or equality before the law, for example: it is simply an infringement of the right to equality. This approach is consistent with the way in which section 15 claims will likely be brought. We can expect that persons alleging breach of their Charter rights will not attempt to define their claims narrowly by reference to a specific type of equality. Rather, they will simply claim a denial of the section 15 right to equality.

On this view, the inclusion of various forms of equality within this broad right is a consequence of the drafters' attempts to respond to caselaw under the Canadian Bill of Rights. "Equality under the law" was added to ensure that the Supreme Court of Canada's interpretation of the right to "equality before the law" in A.G. Canada v. Lavell would not apply to the Charter. In Lavell, the Supreme Court had held that equality before the law applied only to the application of the law in the courts and to the administration of the law; it did not apply to content. Accordingly, the reference in section 15 to equality under the law is meant to indicate that both the administration and the content of law can be examined under section 15. "Equal before the law" indicates there is a right to the equal protection and equal benefit of the administration of the law and "equal under the law" indicates that there is a right to the equal protection and equal benefit of the content of the law (Elliot, 17).

"Equal benefit of the law", it is argued, was included in section 15 to overrule Bliss, in which unemployment maternity benefits were not considered to come within the right to equality under the Bill of Rights because they were a privilege and not a right. Under the Charter, the specific reference to "the equal benefit of the law" means that it may no longer be possible to argue that the law is providing a privilege or a specific benefit, rather than a right, and therefore is not susceptible to challenge under section 15 of the Charter.

The Bill of Rights guaranteed only "the protection" of the law, not "the equal protection". The use of the term "protection" alone could be interpreted to mean that varying degrees of protection could be accorded different groups and that this would be acceptable as long as the members of the group were treated equally in relation to each other (Lavell). The addition of the adjective "equal" to the word protection means that such an argument will be difficult to sustain under section 15 and that the protection of the law will be accorded to all persons to the same degree.

Implications of this Approach

Recognizing a single broad right in section 15 would encourage a fuller development of equality rights under the Charter than if the rights were divided into separate rights. This would seem to be in keeping with the spirit of the Charter and its promise of improving at least the legal and political status of groups which are now subject to discrimination. Not having to define the separate terms will lessen the risk of omitting or neglecting important forms of equality and will avoid giving to the concept of "equality" a legal technicality that could do a disservice to the significance of the term.

However, if section 15 is treated as guaranteeing a single broad right it would be more difficult to establish a separate guarantee of "equal before and under the law" which did not depend on a finding of discrimination.

(ii) Approach 2: There are two rights*

On this view, there is a right to equality before and under the law and a right to the equal protection and equal benefit of the law. This interpretation requires reading in "right" to the first part of section 15; it then treats literally the single right explicitly referred to in the second part of section 15. As discussed below "equal before and under the law" might be a declaratory statement indicating the contexts to which the two rights, the right to the equal protection of the law and the right to the equal benefit of the law, refer. In either case, there would be only two distinct rights guaranteed.

(iii) Approach 3: There are three rights

This approach suggests that equal before and under the law is one right, the right to the equal protection of the law is the second right and the right to the equal benefit of the law is the third right. As was the case with the view that there are two separate rights, it is necessary to read the word right into the first part of section 15 (thus raising the question of the status of "equal before and under the law", discussed below). If this wording is feasible, it would be equally feasible to argue that there is a right to equality before the law, a right to equality under the law and a single right to the equal protection and equal benefit of the law.

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* The implications of Approach 2 are basically the same as those of Approaches 3 and 4, and are set out after Approach 4.

(iv) Approach 4: There are four rights

Each designation of equality can be treated as a separate right. Thus section 15 would guarantee the right to equality before the law, the right to equality under the law, the right to the equal protection of the law, and the right to the equal benefit of the law. As stated above, equality before the law refers to the administration of the law; equality under the law applies to the content of the law; equal protection of the law refers to safeguards offered by the law; and equal benefit applies to the advantages offered by the law or laws.

In order to sustain the view that there are four rights guaranteed by section 15, it is necessary to read the word "right" into "equal before" and to "equal under" the law as well as to "equal benefit of the law". The reading in of "right" to "equal before" and "equal under the law" assumes that the opening words do constitute rights and are not merely a declaration of status. The issue of the status of "equal before and under the law" is discussed below at pp.222ff. Although the heading to section 15 is "equality rights", in fact there is reference to only one right in the section itself and that seems to be to the right to the equal protection and equal benefit of the law. However, this does not preclude reading into the section the implicit use of "right" in relation to the other components.

Implications of Approaches 2, 3 and 4

It is not necessary under the more general approach discussed above, to define each right except in a general sense to understand the broad nature of section 15. Treating the equality rights as separate rights may have the effect of limiting those rights, insofar as it is necessary to attribute a content to each one. Once the rights are treated as distinct rights, it may be necessary for plaintiffs to assert their claims in relation to a specific right and it would then be open to a court to dismiss a claim on the basis that there was no infringement of that particular right, even though there was in fact a denial of some other kind of equality. It would, of course, then be open to a plaintiff to bring a claim under one of the other rights; however, this would unnecessarily add to the cost to plaintiffs under section 15, as well as being an inefficient use of the courts' time and resources. Alternatively, plaintiffs could plead breaches of all four rights, but even so it would be theoretically possible that some denials of equality would not be redressed because they did not quite "fit" into any of the categories as judicially determined over time.

One other possible implication of treating the right separately is that the right to equal benefit might be used to encourage an economic rights interpretation of the Charter. This view has been discussed more fully above (at pp.207-208) but it should be pointed out here that the use of the word "benefit" for this purpose is only feasible when the rights are broken down, rather than treating them as a single broad right to equality or to equality without discrimination.

(b) The status of "equal before and under the law"

The issue here is whether or not "equal before and under the law" is a right (or two rights) or whether it is a statement of legal status or a declaratory provision.

(i) Approach 1: "Equal before and under the law" is a right or rights

One way of viewing the opening words of section 15 is to treat "equal before and under the law" as establishing independent, free-standing rights upon which a claim can be founded; in other words, these rights would be in addition to the right(s) of "equal protection and equal benefit of the law". As suggested above, section 15 does guarantee more than one right according to the heading and the heading is a relevant tool of interpretation according to the Supreme Court in Skapinker. This interpretation could be supported by the fact that an earlier version of section 15 did refer to "equal before and under the law" as a right. On the other hand, the omission of the word "right" in the current version may be treated as significant if it can be shown that it was deliberately omitted.

Implications of this Approach

The significance of treating equal before and under the law as an independent, free-standing right or rights depends on whether or not "without discrimination" qualifies that first part of section 15 or not. If "without discrimination" does qualify "equal before and under the law", much of the advantage of treating equal before and under the law as a separate right is lost, since it would seem to offer little more than that which is provided by the equal protection and equal benefit of the law. However, if "equal before and under the law" is not modified by "without discrimination", the result would be that section 15 is not limited to persons who have been denied equality on enumerated or other recognized grounds. At least some portion of section 15 rights would then be similar to section 2 rights, for example, which do not hinge on a finding of discrimination. The more general discussion of whether or not discrimination is a necessary component of section 15 is discussed in the next section; here it is raised merely to indicate the specific point in relation to "equal before and under the law".

(ii) Approach 2: "Equal before and under the law" is a statement of legal status

On this view, the opening words of section 15 constitute a statement of legal status but do not in themselves guarantee rights. It is because each individual is equal before and under the law that he or she can bring a Charter action claiming that he or she has not enjoyed the equal protection or equal benefit of the law. The inclusion of "equal before and under the law" indicates that section 15 guarantees apply both to the administration (equal before the law) and the content of the law (equal under the law). Treating the opening words as a declaratory statement provides a reference point for "equal protection" and "equal benefit" of the law.

The wording of section 15, which does not explicitly provide for a right in relation to "equal before and under the law", supports this view. Under the Bill of Rights, there was a right to equality before the law and this has not been carried in express terms into the final version of section 15.

Implications of this Approach

If the phrase "equal before and under the law" is seen as a declaration of status, rather than as guaranteeing a right, a narrow view may be taken of section 15 because a denial of equality before and under the law will give no basis for a Charter claim. The claim will be limited to equal protection and equal benefit of the law. However, the reference to the rule of law in the preamble to the Charter may provide much of this protection.

In any event, it may be that the above concerns are neither necessary nor automatic consequences of this approach. The guarantees of the equal protection and equal benefit of the law may be read to encompass all forms of equality; the reference to "equal before and under the law" may indicate the contexts to which those equality rights relate. Regardless of their status, the opening words of section 15 may serve the purpose of ensuring that both the administration and content of legislation is open to judicial review.

SUMMARY OF PAGES 228-243

3. The Role of the Anti-discrimination Clause

Issue is whether a plaintiff must show discrimination on the basis of membership in a protected group in order to obtain standing to make section 15 claim.

(i) Approach 1: A finding of discrimination is not necessary

This view holds that the phrase is merely one form of inequality and should not be used to limit the section.

Based on the heading of section 15 which is "Equality Rights", not "Non-Discrimination Rights".

Reference is made to international law where the non-discrimination clause is used for purposes of clarity and certainty.

(ii) Approach 2: A finding of discrimination is necessary

This view holds that a plaintiff must show discrimination on the basis of membership in a protected group in order to obtain standing under section 15. Based on the nature of the right under section 15 which appears to import human rights concepts based on non-discrimination.

Reference is made to international law.

Implications of Approaches

The first approach would constitute the more extensive equality guarantee.

3. The Role of the Anti-discrimination Clause

The issue here is whether plaintiffs will be required to show discrimination in order to acquire standing to make a section 15 claim. If the anti-discrimination clause is a necessary element in the right guaranteed by section 15, individuals who have been denied equality but cannot attribute the denial to a protected ground will not have recourse to section 15. For example, a person who was ill-treated by an official and could not attribute it to discrimination would be in this position. On the other hand, if the invocation of the positive equality guarantee is not contingent on a finding of discrimination, individuals who allege that they have suffered improper treatment but are unable to ascribe it to a prohibited ground will have access to section 15. This would make section 15 extremely broad.

(a) Approach 1: A finding of discrimination on a protected ground is not required for a finding of an infringement under section 15(1)

It can be argued that the reference to "discrimination" in section 15(1) neither narrows nor expands the scope of the guaranteed equality rights. On this view, the equality rights are not qualified in any sense by the addition of the words "without discrimination." These words -- and the enumeration of particular grounds of discrimination -- merely emphasize the importance of certain forms of inequality. They do not, however, cut back the meaning of "equal protection" or "equal benefit" or add anything not already provided. They are included only for purposes of greater certainty.

It should be noted that the heading to section 15 does not describe the rights as non-discrimination rights, but as equality rights. The original version of section 15 was headed "non-discrimination rights" and read as follows:

> 15(1) Everyone has the right to equality before the law and the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.

The section was re-titled "equality rights" in order "to stress the positive nature of this important part of the Charter." (Gilbert, 409) It should be noted that in the original version, "equality before the law" is stated as a right. It is not clear whether its current status as a "mere" declaratory statement was meant to take away a right to equality before the law or whether it resulted simply from the greater length and grammatical complexity of the section after it was amended.

In any case, section 15(1) does make a positive statement of equality in its opening clause: "Every individual is equal before and under the law." This statement, whether or not it is a "right", is a constitutional provision declaring the equal legal status of every individual. Any law conflicting with this provision would be void by virtue of section 52 of the constitution. It is difficult to read this statement as being qualified in any sense by the words "without discrimination" which appear later in the section. Even if the right to the equal protection and equal benefit of the law is so qualified, the opening statement can stand on its own and has the effect of rendering inoperative any conflicting legislation.

The approach taken here does not require that section 15(1) be divided into its various clauses for purposes of interpretation. To the contrary: the inclusion of equality "before and under", "equal protection", "equal benefit" and "without discrimination" appears to be an attempt to constitutionally prohibit all possible forms of inequality. If a finding of "discrimination" is essential to a section 15(1) claim, some of these forms of inequality will be excluded from Charter protection.

According to this approach, although the equality rights include a right to non-discrimination, they should not be interpreted solely by reference to the concept of "discrimination". This is not because the principle of non-discrimination is an entirely separate concept; but because non-discrimination is logically demanded by the broader meaning of equality. If every individual is in fact equal before and under the law and has the right to the equal protection and equal benefit of the law, discrimination cannot legally exist.

The meaning of discrimination is discussed more fully below (at p.247). For present purposes, it is assumed that discrimination refers to unequal treatment based on identification with particular groups or classes of persons. As such, two requirements must be met in order to show discrimination. First, the unequal treatment must be based on some group identification. Secondly, a claim of discrimination can only be founded on the basis of particular kinds of group identification. (So, for example, treating convicted murderers differently from others is not discrimination because convicted murderers are not the "kind" of group that can claim discrimination. This requirement is discussed more fully below at pp.319-326.)

An interpretation of section 15(1) which focusses on "equality" rather than "non-discrimination" is not limited to the protection of members of particular groups. This interpretation does not simply attempt to identify which groups have been subject to unfair or unequal treatment. Rather, it asks the more fundamental question of whether a particular government action fails to accord to any individual "treatment as an equal". The nature of the right to treatment as an equal has been described in the following way:

> Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's (Dworkin, 272-3).*

It is evident that government action which proceeds on the assumption that members of certain specified groups are less worthy than others would violate the equality principle. "Discrimination" of this kind is clearly prohibited. There are, however, other kinds of government action which cannot be characterized as discrimination but may nonetheless violate the principle. Two of these are considered below: (1) Bias against individuals in the enforcement and administration of the law; (2) Arbitrary classifications resulting in unequal treatment of individuals. These are not meant to be exhaustive. The first is considered because in the past, it has been included in "equality before the law" which the courts have interpreted as meaning "formal" or "procedural" justice of this kind. The second is included because the equal protection clause of the Fourteenth Amendment of the American constitution apparently demands some minimum rationality in all legislative and administrative classifications. Such a requirement will not hold with respect to section 15(1) if equality is interpreted as "non-discrimination". As noted above, the definition of discrimination being used here dictates that only some kinds of legislative classifications are subject to review under section 15(1).

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* It should be noted that this is a liberal conception of equality. It does not dictate that every individual is entitled to an equal distribution of resources, burdens or opportunities. It is a more abstract right and the precise conditions necessary to satisfy it are subject to debate.

Before considering these examples, it may be helpful to consider case law under the Bill of Rights. There, it was recognized that "inequality" may encompass some forms of treatment that cannot be characterized as "discrimination". In the Bill of Rights, the non-discrimination clause appears in the opening paragraph of section 1. It is followed by a list of rights and freedoms. Section 1(b) guarantees equality before the law. In the Lavell case, Mr. Justice Ritchie applied Dicey's definition of equality before the law, i.e. equality before the courts. As has been noted, this "has a tendency to ignore the twentieth century egalitarian concepts which the non-discrimination clause gives to the equality clause" (Tarnopolsky, Canadian Bill of Rights, 300). The inclusion of "equality before and under the law" together with the non-discrimination rights in section 15(1) should avoid this result. This need not lead to the conclusion, however, that individuals do not have any equality rights except to the extent that they can show discrimination.

The equality rights can be read as Chief Justice Laskin suggested that they be read in Curr v. The Queen (with respect to the Bill of Rights):

> ...The existence of any forms of prohibited discrimination [is not] a sine qua non of its operation. Rather, the prohibited discrimination is an additional lever to which federal legislation must respond. Putting the matter another way, federal legislation which does not offend section 1 in respect of any of the prohibited kinds of discrimination may nonetheless be offensive to section 1 if it is violative of what is specified in any of the clauses (a) to (f) of section 1.
>
> It is, a fortiori, offensive if there is discrimination by reason of race so as to deny equality before the law.

We can restrict the meaning of "discrimination" to the denial of equality to individuals on the basis of membership in certain groups; but the fact that there is no discrimination in this sense does not mean that there has been no violation of section 15(1). The "additional lever" is contained in the clause that "every individual is equal before and under the law."

In his dissenting judgment in Lavell, Mr. Justice Laskin (as he then was) commented further on his statement in the Curr case:

> ...(F)ederal legislation, which might be compatible with the command of "equality before the law" taken alone, may nonetheless be inoperative if it manifests any of the prohibited forms of discrimination. In short, the proscribed discriminations in s.1 have a force either independent of the subsequently enumerated paras. (a) to (f) or, if they are found in any federal

> legislation, they offend those clauses because each must be read as if the prohibited forms of discrimination were recited therein as a part thereof.
>
> This seems to me an obvious construction of s.1 of the Canadian Bill of Rights. When that provision states that the enumerated human rights and fundamental freedoms shall continue to exist "without discrimination by reasons of race, national origin, colour, religion or sex" it is expressly adding these words to paras. (a) to (f). Section 1(b) must read therefore "the right of an individual to equality before the law without discrimination by reason of race, national origin, colour, religion or sex".

Professor Tarnopolsky (now Mr. Justice Tarnopolsky) has commented on this judgment as follows:

> ...it does not seem necessary to go as far as the two alternatives suggested in the dissenting judgment of Laskin J. The rights and freedoms "recognized and declared" by the opening paragraph of s.1 are "the following... namely" the rights and freedoms in subsections (a) to (f); they are not those in the opening paragraph. The other alternative which he suggests, i.e., that each clause "must be read as if the prohibited forms of discrimination were recited therein as part thereof" appears to be the more correct, although even here there is some danger that this interpretation would confine the enumerated paragraphs only to such infringements as involve discrimination. Perhaps this is suggesting more than Mr. Justice Laskin intended in his Lavell decision, but it does seem important to emphasize that one must return to his judgment in the Curr case as being more accurate...As he stated in the Curr case, the non-discrimination clause is not a "sine qua non" of the operation of the "inequality before the law" clause, but rather is an additional lever to which federal legislation must respond (Tarnopolsky, Bill of Rights, 300-1).

(i) Equality Before the Law: Bias in the Administration of the Law

Restricting the meaning of section 15(1) to "non-discrimination" will exclude claims to procedural justice except to the extent that those claims arise as a result of group membership. So, for example, bias in the administration of the law would be within section 15(1) if based on racial prejudice; but would not be within section 15(1) if it were based on personal animosity or dislike of a particular individual without regard to any group identification he or she might have.

It could be argued that bias or prejudice of the second kind need not be included within section 15(1) because it is prohibited in any case by the "rule of law" which is affirmed in the Charter's Preamble. Individuals affected by this kind of unequal treatment have recourse to traditional remedies of judicial review. The same may be said, however, with respect to unequal administration of the laws based on racial prejudice. In either case, a failure to apply the law in an even-handed way could give rise to a claim for judicial review.

Rather than arguing that the reference to the rule of law in the Preamble renders superfluous the inclusion of certain forms of inequalities in section 15(1), it can be argued that section 15(1) should be read to include them so as to be consistent with the Preamble's affirmation of the rule of law. As such, the unequal treatment of all individuals through bias in the administration of the laws would be constitutionally prohibited. In terms of judicial review of the administration of laws, the ordinary remedies would continue to be used. The only change would be that the legislature could not constitutionally preclude judicial review of administrative action. An individual claiming bias would be able to claim a remedy by virtue of section 24(1) of the Charter. As a practical matter, this would have little impact. Legislatures have found it difficult in the past to exclude judicial review of administrative action, despite repeated attempts to do so.

(ii) Arbitrary Classifications

Interpreting the equality rights as encompassing individual claims which are not necessarily grounded in "discrimination" would, despite what is said above, have a major impact on the manner in which the section is interpreted. Apart from those instances in which an individual is claiming as an individual (without reference to any group identification), there will also be instances in which an individual is claiming because he is a member of a statutorily defined "group". All legislative classifications define "groups" for the purpose of treating the members differently from the non-members. It can be argued that "equal protection" in section 15(1) requires, as it does in the American constitution, "some rationality in the nature of the class singled out" (Rinaldi v. Yeager, 384 U.S. 305 (1966); and Tribe, 994-6).

Non-discrimination -- as defined above -- does not extend any such requirement of rationality to all legislative classifications. Some classifications do not qualify as discrimination and are therefore outside section 15(1). If a showing of discrimination is essential to review under section 15(1), some legislative classifications that were considered by members of the Supreme Court of Canada to be reviewable under the "equality before the law" clause of the Bill of Rights will not be reviewable under the Charter.

In Mackay v. The Queen, for example, the Supreme Court of Canada considered the question of whether or not legislation affecting a special class (the military) contravened the Bill of Rights' guarantee of "equality before the law." Mr. Justice McIntyre, Dickson J. (as he then was) concurring, held that the legislation did create an "inequality"; but that the inequality did not offend the Bill of Rights because the legislation fulfilled a socially desirable objective. Laskin, C.J.C. (in dissent) held that the legislation did contravene section 1(b) since it subjected "members of the armed forces to a different and indeed, more onerous liability for a breach of the ordinary law as applicable to other persons in Canada who are also governed by that law".*

If a finding of "discrimination" is necessary under section 15(1), it is unlikely that legislation such as this would be subject to Charter review. The military is not the "kind" of group likely to be recognized under section 15. In fact, it would make no difference how the military were treated differently under the law. If the term discrimination can be used to narrow the kinds of classifications that receive judicial scrutiny, those that are excluded may be subjected to quite arbitrary differences in treatment, without recourse to section 15(1).

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* The Bill of Rights does not contain any section equivalent to section 1 of the Charter. The determination of whether or not a provision offended the Bill of Rights therefore included both the question of whether the legislation created an inequality and whether it was justified. The importance of this distinction was noted by LeDain J. in Therens when he stated that under the Bill of Rights the only source of limitation on the right was in the meaning given to it and its application (p.23).

Implications of this Approach

This approach to section 15(1) interprets the equality rights very broadly. As such, it can incorporate forms of inequality recognized under the Bill of Rights and under the Fourteenth Amendment of the American constitution. This broad scope may also be problematic.

In the International legal order, the "positive" principle of "equality before (and under) the law" has been largely replaced with the "negative" principle of "non-discrimination." The former principle limits in a general way the discretionary power on the part of the government. It prohibits "arbitrary" government action. The latter principle defines more narrowly the kind of arbitrary treatment that is prohibited. It is for the purpose of clarity and certainty that "non-discrimination" has gained dominance in the international context:

> The close relationships between the principle of equality before the law and the constitutional structure of a given State, the differences between legal systems when the values have to be defined which determine whether an act has to be regarded as "arbitrary" or "socially unjust", and finally, the extremely broad field of application of this principle make it impossible to define it in a manner valid for all national legal systems and for the formation of a sound basis for its universal application.
>
> In order to avoid these uncertainties and to establish criteria for deciding which facts

> should be regarded as conforming to the principle of equality, the negative formulation of this principle has progressively gained importance in many national legal systems as well as in international law; with the proscription of discrimination.
>
> The basic consideration in favour of this negative approach is to achieve a higher degree of clarity and certainty in arriving at equality. The non-discrimination clause is not limited to the claim that equality should be reached, but indicates also the notion of what should be equal, and according to what criteria. The abstract notion of equality is replaced by a concrete indication of the field of application and of criteria such as race, colour or descent (Partsch, 69).

It should be pointed out as well that if the equality rights are given a very broad interpretation, this may affect the standard of justification under section 1. In particular, the review of all legislative classifications for rationality may suggest a weaker test for some instances of inequality than for others. This approach to "justification", which is like American "levels of scrutiny" analysis, may not be appropriate under section 1 of the Charter. (See below, pp.301ff.)

(b) Approach 2: A finding of discrimination on a protected ground is required for a finding of an infringement under section 15(1)

Constitutional guarantees of rights and freedoms in Canada developed after the widespread enactment of human rights legislation across the country. Human rights legislation was primarily designed to protect people's rights in areas of everyday activity: accommodation, employment and provision of services and facilities. Based on the concept of discrimination, it was directed towards eradicating the adverse effects on people of treatment based on characteristics such as their race, sex or religion, which had nothing to do with their individual capacities. The concept of discrimination defines equality as the right not to be treated on the basis of stereotypes, a concept which, in turn, relates to membership in groups. Thus certain kinds of discrimination or unequal treatment or effect are considered to require state intervention. Distinctions, preferences or exclusions based in part on such grounds are unlawful.

The development of civil liberties has had a chequered history in Canada, as has been briefly discussed above at pp.38ff. However, unlike human rights principles, they have been consistently applied, when they have been applied, to individuals as individuals. It has never been necessary for individuals who have claimed an infringement of their freedom of speech to show the infringement was because of their race, sex, or religion, for example.

The Charter imports both of these traditions. The rights and freedoms other than section 15 equality rights continue the civil liberties tradition; the equality rights reflect the human rights approach. Accordingly, the rights and freedoms other than equality rights do not depend on an anti-discrimination clause but are clearly available to an individual who need not substantiate a denial based on any ground of discrimination, but equality rights are postulated on the basis of non-discrimination.

In keeping with the general principles underlying the Charter, the equality rights very much reflect the desire to protect the rights of minorities against the majority;

accordingly, minority status is an important ingredient. The "civil liberties"-type rights and freedoms, on the other hand, relate to the safeguards offered by the Charter to every individual in relation to the power of the state.

International human rights legislation contains provisions similar to section 15. For example, Article 7 of the Universal Declaration of Human Rights states:

> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Under Article 2, the rights in the Declaration are guaranteed "without distinction of any kind, such as race...birth or other status". Article 26 of the International Covenant on Civil and Political Rights states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race...birth or other status.

These provisions appear to tie equality to an anti-discrimination clause. As does section 15, they begin with a declaration of equality and then grant a right to equal protection of the law without discrimination on certain grounds. Clearly the enumerated categories are meant to be illustrative only, as is indicated by the words "such as". This, too, is similar to section 15, although section 15 does not contain "such as" or an equivalent term ("for example"), but rather the phrase "in particular".

It has been suggested that the inclusion of the anti-discrimination clause in section 15 is a response to Bliss in which the Supreme Court of Canada stated that the issue was whether there had been a denial of equality, not whether there had been discrimination on the basis of sex. Mr. Justice Ritchie declared himself "in accord" with the reasoning of Mr. Justice Pratte in the Federal Court of Appeal that "the question to be determined in this case is therefore not whether the respondent had been the victim of discrimination by reason of sex but whether she has been deprived of 'the right to equality before the law' declared by s.1(b) of the Canadian Bill of Rights". In other words, the anti-discrimination clause is a response to the position of the Supreme Court of Canada in relation to section 1(b) of the Canadian Bill of Rights. Because of the anti-discrimination clause, the court cannot reject a claim under section 15 on the basis that section 15 guarantees equality rather than a right not to be discriminated against on the protected grounds.

Implications of this Approach

This approach permits some control of claims consistent with the plain wording of the section, while at the same time providing a forum for redress of the serious infringements which occur as a result of majority denial of minority rights. Mandatory application of the anti-discrimination clause limits the access to section 15(1) and thereby encourages a stronger section 1 test. On the other hand, that limiting process may be a disadvantage if the courts are reluctant to recognize additional grounds of discrimination as deserving protection under section 15. That could result in many people being unable to bring themselves within a protected ground and therefore being excluded from the section 15 guarantee. Accordingly, whether the requirement of showing discrimination is consistent with a broad, liberal interpretation of the Charter depends largely on the extent to which the courts add to the list of protected grounds.

SUMMARY OF PAGES 247-295

4. The meaning of "discrimination"

Two issues are discussed:

(a) whether the term "discrimination" is implicitly qualified; and

(b) whether it refers to "constructive" discrimination.

(a) Whether discrimination is implicitly qualified

Issue is the nature of the plaintiff's case: what the plaintiff must show to satisfy the anti-discrimination clause

(i) Approach 1: The only qualification is that the discrimination be adverse

Discrimination must have adverse impact before it is prohibited by section 15 but the term is not qualified in any other way.

Discussion of whether adverse impact required under human rights legislation.

(ii) Approach 2: "Discrimination" is implicitly qualified

"Discrimination" is implicitly qualified as extending right only to persons who have the capacity to enjoy a benefit or satisfy a requirement.

Implications of the Approaches

Approach 1 constitutes the more extensive guarantee of equality and is more likely to ensure that the burden of showing limitation falls on the government under section 1. Approach 2 would screen out cases in which discrimination clearly is justifiable because plaintiff lacks capacity to take advantage of the right, but would place a greater burden of proof on the plaintiff.

(b) "Discrimination" can include constructive discrimination

Discussion of the concept of intent as it appears in the caselaw; the history of constructive discrimination in Canada and the United States; examples of constructive discrimination; ambiguous cases; reasons why section 15 can be said to prohibit constructive discrimination; and difficulties with applying the concept.

This paper takes the position that it is not necessary to find unequal treatment in order to hold that discrimination has occurred; the paper notes that because section 15 is concerned with the discriminatory effects of actions.

Based on consideration of human rights caselaw up to O'Malley, decided by the Ontario Court of Appeal, and Bhinder, decided by the Federal Court of Appeal (both of which held that the respective legislation did not prohibit constructive discrimination); of cases subsequent to those two which show a reluctance to depart from the principle that unequal treatment is not necessary; international law; Videoflicks, decided by the Ontario Court of Appeal, which looked to the effect of Sunday closing legislation under section 2(a); and Supreme Court of Canada decision in Big M Drug Mart.

Possible difficulties arising out of this position include the arguable inconsistency arising from the fact that section 15 guarantees rights to an individual while constructive discrimination is concerned with group rights (contrast is made with section 15(2) which refers to groups); the increase in the number of cases which will appear before the courts if claims can be made on the basis of constructive discrimination; and the possibility that not requiring intent will involve the courts in usurping the role of the Legislature.

4. The Meaning of "Discrimination"

As pointed out above, the effect of requiring a finding of discrimination before holding that section 15(1) has been infringed, depends in part on how "discrimination" is defined and how non-enumerated grounds might be recognized by the courts. A requirement of showing discrimination will by itself narrow the scope of section 15. However, if the term is internally limited, it will narrow the scope of section 15 even further. The latter issue is discussed in the next section. Here we consider the definition of discrimination.

Two issues arise in relation to understanding the term "discrimination" for the purposes of section 15. The first is whether it includes an implicit qualification. The second issue is whether it refers only to direct or intentional discrimination.

The simplest definition of discrimination is that it is "the differential treatment of individuals without consideration of merit"; more generally, however, it has meant adverse differential treatment or effects on grounds which have been recognized as a source of inappropriate differentiation, such as race, sex, age, religion or disability. Thus we can define discrimination as: (a) the adverse treatment of persons because of reliance on prohibited grounds (direct discrimination); or (b) adverse consequences on persons with certain characteristics because of the application of policies and requirements which affect them more than other people (constructive discrimination).

Subject to the discussion below on constructive discrimination, the characteristics referred to in the above definitions are those protected by section 15(1). In many cases, differential treatment of persons on a protected ground will constitute discrimination and thus a contravention of section 15. However, not differentiating may also constitute the basis of a challenge under section 15; equality may sometimes require differential treatment since identical treatment may constitute discrimination if persons in different groups are not able to enjoy the equal benefit of a law or policy. In Jean Tharp v. Lornex Mining Corp. Ltd. (B.C., 1975), cited in Bhinder v. Canadian National Railways (1981), 2 C.H.R.R. D/546 (Tribunal decision) rev'd (1983), 4 C.H.R.R. D/1404 (F.C.A.) (on appeal to S.C.C.), a female employee was required to share washroom facilities with male employees; the board held that "identical treatment does not necessarily mean equal treatment or the absence of discrimination". In the United States, the Supreme Court held in Lau v. Nichols, 414 U.S. 563 (1979) that "uniform treatment does not satisfy an antidiscrimination directive when particular circumstances deny a protected individual a meaningful opportunity to participate". Lau v. Nichols involved affirmative action for non-English-speaking Chinese students under the Civil Rights Act*.

Several questions arise in relation to the meaning of "discrimination": must the discrimination be adverse or is positive discrimination prohibited by section 15? must persons be capable of enjoying a right before denying it to them can be called discrimination? and what is important about discrimination -- the intention to discriminate or the effect of the discrimination on the individual who is subject to it?

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* Under the Charter, of course, affirmative action is permitted by section 15(2) which confirms in the circumstances contemplated by section 15 that different treatment for the purpose of improving people's condition does not contravene the guarantee of equality.

(a) Whether Discrimination is qualified in any way

The issue here is whether the term "discrimination" has an implicit modifier of any kind. If it does, it may have implications for the case to be established by the plaintiffs.

(i) Approach 1: The plaintiff merely has to show the discrimination has adverse impact

On this view, the concept of discrimination would be unqualified by an implicit modifier except by the term "adverse". Only discrimination having a negative impact would be prohibited under this first approach*.

The Quebec Charter of Human Rights and Freedoms is the only provincial human rights law which currently defines discrimination. Section 10 states that discrimination exists where there is a distinction, exclusion or preference based on one of the enumerated grounds with the effect of nullifying or impairing the person's rights and freedoms. Thus the definition in the Quebec Charter requires adverse impact. The

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* Even if discrimination were defined to include a preference or a distinction having positive impact, it is possible that an individual not receiving the preference or not being positively affected by a distinction could claim a negative or adverse effect. However, as discussed later in the paper, the courts may not be prepared to accept that all exclusions from positively conferred benefits, however incidental or fanciful in impact, come within the meaning of "discrimination" for the purpose of section 15(1).

Canadian Human Rights Act specifies discriminatory practices and also more generally defines discrimination as differentiating adversely in relation to a person on a specified ground. Generally, however, the human rights codes do not expressly require an adverse impact, although it is possible to argue that it is understood.

The definitions set out by some boards and tribunals do not seem to have required a showing of adverse impact. Peter Cumming stated in the Tribunal decision of Bhinder that "fundamental to the concept of discrimination is the existence of a preference or distinction based on the individual's characteristics but not related to an individual's merits". He cited the following definition with approval:

> 'discriminate' means to make a distinction in favour of or against the person or thing on the basis of the group, class or category which the person belongs (from Courtner v. The National Cash Registry Co., 262 N.E. 2d 586 (1970)).

The approach in the above quotation is preferable to Cumming's own definition because the essence of discrimination is that it occurs precisely because the person is not treated on the basis of his or her individual characteristics, but rather on the stereotypes and expectations attached to a characteristic shared with others -- that is, on the basis of membership in a class or category to which stereotyped assumptions are attached. However, neither definition expressly requires adverse impact.

Dictionary definitions cited in Gadowsky v. The School Committee of the County of Two Hills, No. 21 (1980), 1 C.H.R.R. D/184 also are neutral in respect of adverse impact:

Oxford:

> To make or constitute a difference in or between: to differentiate; ...to perceive or note the difference in or between; to distinguish...to make a distinction.

Webster's New World:

> To make distinction and [sic] treatment, show partiality and favour of or prejudice against:

Webster's Third International:

> To make a difference in treatment or favour on a class or categorical basis in disregard of individual merit.

The last definition is the most consistent with the framework of human rights legisation since it refers to class or category, although it, as the others, does not specify adverse impact. However, a dictionary definition of discrimination is not necessarily appropriate when put into the section 15 context. These dictionary definitions are not concerned with either negative or positive effects; in this sense, they are "context-neutral".

The requirement that the discrimination be adverse follows from the view that in order to have a cause of action, one must have suffered an injury. Without adverse consequences, there is no basis for an action. One cannot base a claim on having received a benefit: one can only challenge discrimination in someone else's favour if it has had negative or adverse consequences on oneself. As well, of course, a section 15 challenge can be based on an allegation that a legislative classification or administrative decision is directly adverse to the plaintiff.

It should be noted that some cases have included an affront to dignity as an adverse consequence. In Rasheed v. Bramhill (1980), 2 C.H.R.R. D/249, the Nova Scotia Board of Inquiry cited an Alberta case (Payne v. Calgary Sheraton Hotel (June 1975)):

> In determining whether or not a person has discriminated against any other person, the action must be looked at from the point of view whether intentionally or unintentionally the person doing the act has in some way offended the dignity of the person with whom he's dealing.

The Board also quoted Ian Hunter, 15 U.W.O.L.R. 2:

> Discrimination means treating people differently because of their race, colour, sex, as a result of which the Complainant suffers adverse consequences or a serious affront to dignity.

This meaning of "adverse" would mean that a challenge could be brought against so-called protectionist legislation which may be seen by those who are subject to it as not respecting their status as independent members of society*.

It should be noted that a plaintiff, to show that there has been adverse discrimination, need only show he or she has been denied the opportunity to enjoy the benefit denied or satisfy the requirement imposed. If the plaintiff can show denial of opportunity successfully, the burden shifts to the government to justify the denial.

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* "Protectionist legislation" as affirmative action is referred to below at pp.369-370.

In the next section of this paper, there is an exploration of the arguments in favour of a capacity test as being an inherent part of the section 15 rights. For present purposes, it is sufficient to note that this approach would result in an increased burden on Charter plaintiffs. Plaintiffs would probably have to show, as part of their case, that they had the capacity to enjoy a right, the exercise of which they had been denied.

It is helpful to note in this connection that the courts have treated other Charter rights as not internally qualified. For example, the view that the rights are qualified has been rejected by the Ontario Court of Appeal in Southam (accessibility to juvenile trials case). Extrapolating from that case, which dealt with section 2(b), the onus is on the government to show under section 1 that the plaintiff's lack of capacity justifies the denial of the right to equality. This scheme would be met by a definition of discrimination which did not include a qualification other than that it be adverse.

Implications of this Approach

It is important to note that a prima facie case merely establishes the basic facts. Satisfaction of a basic onus by the plaintiff will shift the onus to government. The question at this stage is not, "should the plaintiff be successful" but, "should the plaintiff be allowed his day in court". This approach facilitates the assertion of Charter rights by plaintiffs, and shifts the burden to government sooner than does approach 2.

(ii) Approach 2: Discrimination is prohibited only if the plaintiff has the capacity to enjoy the benefit

Under this approach, there is discrimination only if persons have the capacity to enjoy the benefit refused or to satisfy the requirement imposed. This interpretation is illustrated by "the blind driver" case. If discrimination occurs only if the individual has the capacity to enjoy a benefit, the blind person denied a driver's licence has not suffered discrimination because clearly a blind person cannot drive. However, if this approach were adopted, the capacity requirement would apply to all cases. Some cases are much harder to deal with. One example of a "harder case" would be the denial to men of the opportunity to work in government child care services on the ground that they do not possess the capacity to satisfy a fundamental requirement of the job. Such a case is rather more difficult to deal with than the blind driver cases, not because men do lack the capacity to take care of children, but because in the real world more people are likely to debate the point than whether a blind person should be allowed a driver's licence. Introducing the notion of capacity into the meaning of discrimination in this explicit way also unnecessarily introduces this kind of problem under section 15 analysis. As well, as noted under the discussion of approach 1, it seems likely to place an onus on the plaintiff, in all cases, to prove his or her capacity to exercise the right in question.

Contrary to this view on the onus question, proponents of approach 2 argue that the onus would be on the government to show that the individual lacked the capacity; therefore, there would be a shift of onus within section 15 itself. This is important because once the shift from section 15 to section 1 occurs, the government would be obliged to satisfy all the components of section 1, including that the limit be prescribed by law. In obvious cases of incapacity, it would not make sense that the limit was struck down simply because it was not prescribed by law. (See the discussion of "prescribed by law" above at pp.166ff., which indicates that express prescription may not be required.)

One variant of the qualified discrimination approach would require that the determination of capacity would apply only after consideration of whether reasonable accommodation would permit the individual to enjoy the benefit or right. In the case of a blind driver, we cannot at present conceive of an accommodation which would permit the person to drive but in other cases it may be possible to provide some form of accommodation which would permit the person to enjoy the right or benefit. Certainly we permit persons with impaired vision short of blindness to wear corrective lenses to take a driver's test and to drive. The Ontario Human Rights Code has dealt with this issue. It states that there is no infringement if the only reason the handicapped person is denied a right is that he does not have access to the premises, services, goods, facilities or accommodation or "that the premises...or accommodation lack the amenities that are appropriate for the person because of handicap". The Code does not require reasonable accommodation in these cases but this does not mean that the Charter would not require it.

Implications of this Approach

The capacity approach would filter out the obvious cases and would encourage the development of a stringent section 1 test. It also means that for these obvious cases, such as the blind driver case, the government would not have to be concerned about the section 1 "prescribed by law" requirement, for these cases would not get to section 1 either because the plaintiff would be unable to make a prima facie case under section 15 or because the shift in onus to government would occur within section 15.

Under this approach it is likely that a plaintiff, to make a prima facie case, would have to show that he has the capacity to enjoy the benefit denied or satisfy the requirements imposed. The onus is on the plaintiff to make this case because the right is defined as the right not to be discriminated against where one has the capacity to enjoy the benefit or satisfy the requirement. This means that the plaintiff has the onus of showing that he has the capacity, rather than that the government has the onus of showing he does not have the capacity. Proponents of the capacity view argue that the onus would be on the government, but there is a grave risk that it will fall on the plaintiff. Section 24 requires the plaintiff to show a breach of the right as defined. Under this approach, capacity would be part of the definition.

(b) "Discrimination" Can Include Constructive Discrimination

The judiciary and legislators have evolved an increasingly sophisticated understanding of discrimination over the past forty years. Professor Tarnopolsky (now Mr. Justice Tarnopolsky) has traced this development in the American context (Tarnopolsky, Discrimination). Until the end of the 1940's, it was necessary to find an evil motive for the discriminatory act in order to impugn it: hostile animus was a crucial element. For the next 20 years or so, the "equal protection" concept applied and it was sufficient to find that members of a specific group had actually been treated differently, although there did not have to be an evil intention. Now the "consequences" or "effects" approach plays a significant role; it requires neither intention nor unequal treatment since it is the unequal effect of the treatment which constitutes the measure of discrimination.

As was noted in the preface, Ontario agrees that section 15 of the Charter can be used to address constructive discrimination. Before setting out the reasons for interpreting the Charter as prohibiting constructive discrimination, it may be of assistance to examine the concept of intent, the history of constructive discrimination, examples of constructive discrimination and ambiguous cases.

(i) The Concept of Intent

As indicated above, initially, intent was used as a synonym for motive; thus intent had to be malicious or hostile in order to attract sanction. This use of intent is less likely to occur in the caselaw today than in the past. In Canadian law, intent is defined as acting with knowledge or recklessness of the existence of circumstances and with the desire for or foresight of the consequences of one's actions (Doherty). However, the human rights caselaw has not always reflected this definition of intent.

In Etobicoke, the Supreme Court of Canada made it clear that malice is not required for an act to be discriminatory. In that case, the Court found that the Borough of Etobicoke had established mandatory retirement for firefighters at age sixty in good faith. Nevertheless, the provision was held to be intentionally discriminatory because it could not satisfy the objective requirement that it be "reasonably necessary" to the performance of the job.

In Cameron v. Nel-Gor Castle Nursing Home (1984), 5 C.H.R.R. D/2170, Chairperson Cumming distinguished between "intent" and "motive". It is the act which reveals the intent; it is not the reason for the act which constitutes the intent -- that is motive. In that case, since the respondent did not believe that Cameron could perform her duties as an employee because she was handicapped when the respondent denied her employment, the respondent obviously intended to discriminate against Cameron. Cameron was refused employment as a nurse's aid because the employer believed that she would have difficulty lifting patients because three fingers on her left hand were shorter than the others. The Board stated:

> There was no malice, hatred or ill-will on the part of Mrs. Nelson. She was acting with subjective good faith, that is, she honestly believed that Ms. Cameron's handicap rendered her less capable than a person without such a handicap in performing the essential duties of a nurse's aide.
>
> Respondents argue that the absence of "malice" means there cannot be a breach of the Code, but I disagree. The employer's subjective good faith is not relevant to the initial determination of whether or not there is a prima facie breach of Part I of the Code. It is enough to constitute a prima facie breach if the employer intends to "infringe or do, directly or indirectly, anything that infringes a right" under Part I. 'Intention' must be separated from 'motive' which goes to the reason for doing the intended act. Clearly, Mrs. Nelson intended her act of discrimination toward Ms. Cameron. Clearly, her motive was benign in that she did not think Ms. Cameron would be able to perform her duties as an employee satisfactorily.

Rather than involving considerations of malice, intent connotes deliberate action or action taken with awareness of or recklessness in relation to the circumstances and consequences. Thus, intent might involve knowing that one was distinguishing on a particular ground and that one was fully aware of that fact; this is simply a question of making a conscious decision regardless of the effects of one's actions. An express classification on the face of the law would be evidence of intent. On this basis, it is not necessary to inquire into the legislature's motives for passing the law. The existence of the law suffice as evidence of intent to pass it with the explicit classification on a prohibited ground.

A contrary view has been suggested in relation to action taken on the basis of stereotypes. Although this would seem to involve intentional action, since one is aware of the effects of one's actions, it is argued that this is acting unintentionally because one is not aware that the behaviour is in any sense inappropriate. According to this view, there is nothing wrong with treating people in a manner consistent with what are perceived to be their characteristics or as "nature" requires, because there is no intention to discriminate against the person. This view seems to incorporate the concept of fairness into discrimination; if certain treatment is appropriate for people with certain characteristics, then that treatment even if called "discriminatory" would not be unfair, some people would say such treatment would not be discriminatory at all.

For example, for many years married women were not offered promotions requiring a transfer because it was generally assumed that they would not want to move. This assumption was part of the general view of women as secondary wage-earners and as generally having a home-based position in the family. Female employees were simply not considered in the same way as male employees, not only by employers but by most members of society. This kind of "behaviour" is different than a deliberate refusal to consider a particular person for a job because of his colour or disability when the employer believes that blacks or persons with the particular disability cannot perform the requirements of the job.

However, in both circumstances the results to the disadvantaged group are the same. In both cases a decision has been consciously taken to treat a group of persons differently because of their sex or race. Although in one case the intentional action might be seen as benign, in both cases a deliberate decision results in a whole group of people being denied equal opportunity. It is because this results analysis reflects the basic purpose of human rights legislation -- consideration of people on their own merits apart from assmptions about group characteristics -- that the first definition of intent offered above seems the most appropriate for section 15.

(ii) The History of Constructive Discrimination

The first judicial recognition of constructive discrimination occurred in the United States. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), written tests required by Duke Power Co. had the effect of disproportionately and inappropriately excluding blacks from employment and promotion. The Supreme Court of the United States held the tests contravened Title VII of the Civil Rights Act, 1964 which explicitly prohibits discrimination which adversely affects a protected group. In McDonnell Douglas Corporation v. Green, 93 S.Ct. 1817 (1973), the Supreme Court of the United States stated that "Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives". The factors the tests were established to discern were, in Griggs, not required for the job. However, Griggs could not be used to support an argument that tests be overlooked if they determine characteristics which are necessary to the performance of the job.

The interpretation of the concept of discrimination under the Civil Rights Act in the United States should be contrasted with the interpretation under the equal protection clause of the 14th Amendment where constructive discrimination has not been recognized. In Jefferson v. Hackney, 406 U.S. 535 (1972), the Supreme Court rejected a de facto discrimination claim that the distribution of welfare benefits under scheme "A" were less than under other schemes. It was asserted that "there is a larger precentage of Negroes and Mexican Americans in [scheme A] than in other programs". Justice Rehnquist noted for the majority that "given the heterogeneity of the Nation's population, it would be only an infrequent coincidence that the racial composition of each grant class was identical to that of the others". The high level of scrutiny involved in assessing welfare programs for "each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational" was not required by the 14th Amendment.

Under the 14th Amendment, "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of [a forbidden] invidious racial discrimination..." (Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040 (1976)). Washington v. Davis involved the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department. A far greater proportion of black candidates failed the test than did whites. The number of black police officers on the force, while substantial, was not proportionate to the population mix of the city. Justice White stated for the court:

> [The process under Title VII of the Civil Rights Act of validating the necessity of tests for job performance] involves a more probing judical review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and and 14th Amendments in cases such as this. A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white. Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 99 S.Ct. 2282 (1979) presented a challenge to the constitutionality of a state veterans preference statute under which all veterans who qualified for state civil service positions had to be considered for appointment ahead of any qualifying nonveterans. The preference operated overwhelmingly to the advantage of males. Of the 47,000 civil service appointments made during the relevant time, 43% of those hired were women, and 57% were men. Of the women appointed, 1.8% were veterans, while 54% of the men had veteran status. A large unspecified percentage of the female appointees were serving in lower paying positions for which males traditionally had not applied. The plaintiff in Feeney had been rejected for several positions for which she was qualified solely because less qualified veterans (that is, they scored lower than Feeney on the examinations) were given the positions.

The impact of the veterans' preference law upon the public employment opportunities of women was, therefore, severe. Justice Stewart, delivering the opinion of the Court stated that

> [Discriminatory purpose] implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. Yet nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service....

Mr. Justice Marshall, joined by Justice Brennan, dissented, stating:

> [In] my judgment, Massachusetts' choice of an absolute veterans' preference system evinces purposeful gender-based discrimination. And because the statutory scheme bears no substantial relationship to a legitimate governmental objective, it

> cannot withstand scrutiny under the Equal Protection Clause...
>
> To survive challenge under the Equal Protection Clause, statutes reflecting gender-based discrimination must be substantially related to the achievement of important governmental objectives. [Although the State's goals are] unquestionably legitimate, [the] Commonwealth has failed to establish a sufficient relationship between its objectives and the means chosen to effectuate them. [Given] the range of alternatives available [to encourage military service and reward veterans], this degree of preference is constitutionally impermissible....

Note that Justice Marshall did not base his opinion on a recognition of constructive discrimination but on a finding that the preference was "purposeful" or intentional.

Constructive discrimination was first recognized in Canada in Re Attorney General for Alberta and Gares (1976), 67 D.L.R. (3d) 635 (Alta S.C.T.D.). That case involved differential in pay rates between male and female employees which had arisen because the groups had been the subject of different collective agreements. The court held that "[i]t is the discriminatory result which is prohibited and not a discriminatory intent". The claim was based on a contravention of the equal pay provisions of the Individual's Rights Act, 1972. However, there was no intention to pay women different wages; it was rather a consequence of the fact the bargaining unit composed of women had negotiated lower wages than the unit composed of men.

There was also early recognition of the concept in Ontario. The case of Singh v. Security and Investigation

Services Ltd. (Ontario, 1977) held that unintentional discriminatory results were prohibited by the predecessor to the current Ontario Human Rights Code. The Code did not contain an express prohibition of constructive discrimination. Singh was unable to comply because of his religion with the employer's requirement that guards wear a cap and be clean shaven. The Board of Inquiry found that the respondent was "innocent of all discriminatory intent". However, the respondent's requirements had the effect of disproportionately excluding Sikhs from employment with Security and Investigation Services.

Until the recent Ontario Court of Appeal decision in Ontario Human Rights Commission et al v. Simpsons Sears Ltd. (1982), 38 O.R. (2d) 423 (O'Malley) and the recent Federal Court of Appeal decision in Bhinder v. Canadian National Railway, both discussed below, many boards and tribunals under the federal and provincial human rights acts had held that the legislation prohibited constructive discrimination without express wording to that effect. Prior to O'Malley and Bhinder, the presumption seems to have been in favour of considering constructive discrimination to be included in the broader term "discrimination". The Board of Inquiry in Gurman v. Greenleaf (1982), 3 C.H.R.R. D/808 concluded that since the Manitoba Act does not address itself to motivation, "we can only assume that discrimination is a question of fact and that motivation is irrelevant". It should be noted, however, that the use of the term "motivation" might be meant to refer to hostile motivation, rather than to intent in the sense of acting with knowledge of or recklessness as to the consequences.

A number of Ontario cases followed the approach in Singh v. Security and Investigation Services Limited in which the requirement that employees wear a cap and be clean-shaven was held to contravene the Ontario Human Rights Code because it had a disproportionate impact on Sikhs. A prohibition against taxi drivers' wearing beards or long hair was held to contravene the Ontario Code in Khalsa v. Associated Toronto Taxi-Cab Co-operative Limited (1980), 1 C.H.R.R. D/167, because it prevented Sikhs from applying for jobs as drivers. The Board found the contravention even though "[t]here [was] no suggestion of malice or intended discrimination on the basis of religion on the part of the respondent" (emphasis added).* A requirement that a Sikh receiving treatment at the Workmen's Compensation Board Hospital remove his kirpan before receiving further treatment was found to contravene the predecessor Ontario Code in Singh v. Workmen's Compensation Board Hospital and Rehabilitation Centre (1981), 2 C.H.R.R. D/459. The Board of Inquiry held that "[i]t is abundantly clear that the Respondent hospital and all of its officials acted without malice or intent to discriminate against Mr. Singh or the Sikh Community" (emphasis added).

Height and weight requirements for police officers were also found to contravene the Code in Colfer v. Ottawa Board of Commissioners of Police (Ontario, 1979). The requirements were found to have the effect of excluding nearly all women from the police force.

In other cases, boards have stated that the governing legislation encompassed constructive discrimination but have found that the facts of the case did not sustain the complaint. One example is Malik v. Ministry of Government Services (1980), 2 C.H.R.R. D/376 (Ont.). Malik maintained that the job interview process which he had to undergo for a government position discriminated against persons with his cultural background. The Board of Inquiry stated that a prohibition against constructive discrimination was encompassed in section 4(1) of the 1980 Ontario Code (which did not expressly prohibit it) but found that discrimination was not shown on the facts of the case.

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* For a discussion of the possible distinction between "motive" and "intention", see above pp.257-259.

In O'Malley, the Ontario Court of Appeal found that under the 1980 Ontario Human Rights Code there had to be an intention to discriminate; Lacourcière J., for the Court, stated that "the majority of the Divisional Court* properly held that the language of the subsection [the phrase "because of"] and the absence of a saving provision imply that an intention to discriminate on a prohibited ground is essential to a contravention of s.4(1)(g)". Lacourcière J.A. held that "[t]he offence created by the Code, proscribing discrimination 'because of' race, creed, colour, etc. clearly refers to the employer's motivation". In the Divisional Court, Southey J. (Gray J. concurring) referred to the attempt by the Chairman of the Board of Inquiry** to read into the Code a "very general standard of whether the employer had acted reasonably in attempting to accommodate the employee 'in all of the circumstances of the case as well as in the context of the general scope and objects of the Code'". Although Southey J. appears to consider the concept of a "saving provision" in the context of the issue of the employer's duty to accommodate, His Lordship also discussed it in a broader sense, stating "[w]ithout some such saving provision, any condition of employment that happened to be incompatible with the religious beliefs of any employee or prospective employee would be unlawful, regardless of how essential or important it was to the employer's business". He pointed out that section 4(6), "[t]he only provision in the Code that is in any way directed to the underlying problem" is limited to discrimination on the basis of age, sex and marital status. The ground at issue was religion. Section 4(6) stated that the prohibition against discrimination on those grounds did not apply where the ground was a bona fide occupational qualification and requirement. The 1981 Code expressly prohibits constructive discrimination but contains a reasonable and bona fide qualification exemption which applies to all grounds.

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* (1982), 36 O.R. (2d) 59.

** O'Malley v. Simpson-Sears Ltd. (1980), 2 C.H.R.R. D/267.

The majority of the Federal Court of Appeal found in Bhinder that the Canadian Human Rights Act did not encompass constructive discrimination, holding that specific wording such as that found in section 10 of the 1981 Ontario Code was required. Heald J. was not persuaded by Griggs v. Duke Power because it was based on Section 703(a)(2) of the Civil Rights Act which includes the words "or otherwise adversely affect"; neither these nor similar words appear in the Canadian legislation. LeDain J., in dissent, found that section 10 of the Act provided a basis for a finding of discrimination. It reads as follows:

> 10. It is a discriminatory practice for an employer or an employee organization
>
> (a) to establish or pursue a policy or practice, or,
>
> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to

> deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

Both Bhinder and O'Malley are cases of constructive religious discrimination. Bhinder was unable to comply with CN's requirement that he wear a hard hat because, as a Sikh, he was unable to wear headgear other than his turban or to wear anything over his turban. The newly imposed requirement that all employees working in the Coach Yard where Bhinder worked wear hardhats was clearly meant to apply to all employees (it was facially neutral); equally clearly, CN did not impose the requirement in order to remove Bhinder or Sikhs from its workforce. However, it did have the effect of removing Bhinder from CN's workforce because the consequences of the requirement were different for him than for other employees because of his religion.

Similarly, O'Malley was unable to comply with her employer's requirement that she work certain Saturdays because as a Seventh Day Adventist she could not work on Saturdays. Again, all employees were required to work their share of Saturdays and the rule about Saturdays was not implemented to remove O'Malley from the ranks of Simpsons-Sears' employees. Nevertheless, it had that effect because the consequences of the requirement were different for O'Malley than for other employees because of her religion.

Both O'Malley and Bhinder have been heard by the Supreme Court of Canada which has reserved judgment. Since the decisions in O'Malley and Bhinder, boards and tribunals have evidenced a reluctance to follow those cases. Even though some board members have felt they had no choice, others have either expressly refused to follow them or have gone to great lengths to distinguish the cases from their own.

The Bhinder decision was not followed by a Review Tribunal in Marcotte v. Rio Algom Limited (1983), 5 C.H.R.R. D/2010. Rio Algom had provided subsidized housing to employees in certain categories; 73% of the employees in the excluded categories were women. There was no intention to discriminate against women, nor was there differential treatment against women as such. Rather, there was differential treatment on the basis of job classification which had the effect of treating female employees differently from male employees. In Charter language, the female employees did not enjoy "the equal benefit" of Rio Algom's housing policy. The Review Tribunal dealt with the Federal Court of Appeal's decision in Bhinder and explicitly declined to follow it, in part because it could not see "how any connotation of intent can be derived from the words 'deprives or tends to deprive' which are contained in section 10 of the Canadian Human Rights Act". The Review Tribunal dismissed Marcotte's appeal, however, because it held, with the Tribunal of first instance, that the company's policy was reasonable and fair under the circumstances. The dissenting member of the Review Tribunal reluctantly considered herself bound by Bhinder and therefore declined to make a finding of discrimination. However, she would have not accepted the employer's justification for its policy since she believed that it was an economic justification based on stereotyped assumptions about the role of women as secondary wage-earners.

The Canadian Human Rights Tribunal in Action Travail des Femmes v. Canadian National (1984), 5 C.H.R.R. D/2327 (Can. Tri.) stated that the Federal Court of Appeal decision in Bhinder "is in error, and that the distinction that the Court attempted to make between section 10 and section 7.03 of Title VII rests on no solid foundation". It decided, however, that the requirement of intent was met since "Canadian National was aware of the consequences of its hiring practices...Canadian National knew several years before the complaint was filed that its hiring practices had a negative effect on the employment of women and that women were under-represented at Canadian National compared with their general employment situation. The Canadian National continued these hiring practices, knowing their consequences....We therefore believe that CN 'meant what [it] did' (Robinson v. Lorillard Corporation, 444 F 2d 791 1 (1971)". Here intent is clearly defined as "awareness of the effect of one's actions".

Ontario Boards have similarly been reluctant to follow O'Malley. Prior to the delivery of the decision in Rand vs Sealy Eastern Limited (1982), 3 C.H.R.R. D/938, but after the hearing itself, the Divisional Court delivered its judgment in O'Malley, stating that the Ontario Code did not prohibit constructive discrimination. The Board in Rand considered itself bound by O'Malley, particularly because the Rand facts were similar to those in O'Malley, although the chairman strenuously disagreed with O'Malley. Rand's employer required him to take a training course on Saturdays although the employer knew that Rand, as an Orthodox Jew, could not comply. The Board found that

> it is my view that intent to discriminate is present within the meaning of the Code, as interpreted by the Divisional Court, even though there was no malice as part of that intent.
>
> ...
>
> while he bore no ill will toward Mr. Rand because of his creed, Mr. Tosh did intend to

> discriminate against Mr. Rand because of his creed.

Knowledge that Rand's religion would not allow him to comply constituted the necessary intent, permitting a decision in favour of Rand even under the O'Malley test. However, the Board also expressed the view that intent is not necessary. In support of this view, the Board pointed out that the test for bona fide occupational qualification as enunciated by the Supreme Court in Etobicoke (discussed above in relation to evidence which might be produced by government under section 1) involves both a subjective and objective element with the result that "it is not enough for an employer to have an absence of intent to bring himself within the saving provision."

In Manitoba Food and Commercial Workers Union v. Canada Safeway Ltd. (1983), 4 C.H.R.R. D/1459, rev'd by Canada Safeway Limited v. Steel and Manitoba Human Rights Commission, [1984] 4 W.W.R. 390 (Man. Q.B.) (leave to appeal to S.C.C. refused, February 11, 1985), under the Manitoba Human Rights Act, the Board of Adjudication distinguished O'Malley on two grounds in order to find that intention is not necessary for a finding of discrimination. The Manitoba legislation contains a saving provision which did not appear in the 1980 Ontario Code (the lack of a saving provision appeared to be an important factor in O'Malley, see above, pp.267-268). Section 6(6) of the Manitoba legislation, the saving provision, states that the non-discriminatory provisions do not apply where sex or certain other grounds constitute a reasonable occupational qualification. The wording is comparable to section 4(6) of the predecessor to the current Ontario Code which was at issue in O'Malley. However, section 4(6) of the Ontario Code did not refer to "religion", the basis on which the complaint had been laid in O'Malley, while section 6(6) of the Manitoba Act does refer to "sex", the ground upon which the complaint was made in Canada Safeway. Section 2(1)(d) of the Manitoba Act refers to "discrimination or intention to discriminate", suggesting there could be discrimination without intention*. On this point, the Adjudicator was upheld on appeal.

The Manitoba Court of Queen's Bench in Osborne v. Inco Limited (1984), 5 C.H.R.R. D/2219, rev'g (1983), 4 C.H.R.R. D/1635**, agreed with Wright J.'s decision in Canada Safeway that intention is not necessary for a finding of discrimination. Kroft J. distinguished the Manitoba legislation from both the former Ontario Code and the Canadian statute as follows:

> Section 6(1) of the Manitoba Act enshrines in general terms, as a privilege to be enjoyed by every person, "The right of equality of opportunity based upon bona fide qualifications in respect of his occupation or employment." Without limiting the generality of that right, it prohibits discrimination on a number of specific grounds including religion. In contrast the former Ontario Human Rights Code and the Canadian Human Rights Act in their operative sections are drafted as direct prohibitions of particular kinds of discrimination in employment. They are narrow and regulatory, rather than general and result oriented.

In a recent case involving the seating in a movie theatre of a patron in a wheelchair, Huck v. Canadian Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission, [1985] 3 W.W.R. 717 (Huck) Court of Appeal held that the prohibition against discrimination under the Saskatchewan Human Rights Code encompassed unintentional discrimination. The Code does not contain an express wording forbidding constructive discrimination.

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* There appears to have been no consideration of whether "intention to discriminate" might have been intended to include future discrimination planned but not yet practised.

** The Manitoba Court of Appeal overturned the Court of Queen's Bench decision on the facts. However, the majority agreed with the lower court with respect to whether a finding of intent was required: (1985), 6 C.H.R.R. D/2591.

The complainant, who went to watch a movie in a wheelchair, was required to view the movie from the first row of seats. The choice in seating available to other patrons was not available to him as a result of his disability. The Board of Inquiry found in his favour. This decision was overturned by the Court of Queen's Bench. On appeal to the Court of Appeal, the Board's decision was reinstated. The Supreme Court of Canada has refused leave to appeal the Court of Appeal decision.

Vancise J.A., Hall J.A. concurring, set out the appropriate interpretation of the anti-discrimination provision in the context of the case:

> The question to be determined in this case is whether the physical arrangements for the viewing of a movie which are available to all members of the public but which have the practical effect or consequence of discriminating against one or more members of the public because of a prohibited ground, i.e., physical disability, is discrimination....
>
> The absence of a motive to discriminate is not determinative of whether there has been discrimination. It is not discriminatory intent which is prohibited by the legislation but the discriminatory result [citing Re: Attorney General of Alberta and Gares]. It is true that intention or motive can be determinative of

> the issue in some cases...but it is not an essential ingredient. If the result of the action or practices which are otherwise neutral on their face result in discrimination, they are prohibited under the Code.
>
> ...
>
> ...If the effect of the treatment has adverse consequences which are incompatible with the objects of the legislation by restricting or excluding a right of full and equal recognition and exercise of those rights it will be discriminatory.*

(iii) Examples of Constructive Discrimination

A variety of terms have been used to refer to the phenomenon of discriminatory effect. They are usually employed interchangeably, although there are subtle differences among some of them. The usual terms in Canadian caselaw are constructive discrimination and systemic discrimination; in the United States, the terms disproportionate or disparate impact are more commonly used, although they have been adopted in the Canadian context to some extent; in Britain, the term "indirect discrimination" is employed. In this section some examples are provided to demonstrate the consequences of a decision to include or exclude constructive discrimination from section 15.

Legislation or guidelines which are neutral on their face may affect some groups more adversely than others by placing a higher burden on them or resulting in lower benefits for them: the legislation has a disproportionate impact on the members of a particular group. It is constructively discriminatory because the standard or requirements do not expressly refer to that group or class (or to a particular characteristic of the class) but the consequence of applying the legislation will be similar to the effect of an express reference to the group. Section 10 of the Ontario Human Rights Code, subject to a reasonableness test, prohibits constructive discrimination:

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* Cameron J.A. also accepted that the Board's decision could not be characterized as unreasonable, thereby implicitly agreeing that the prohibition against discrimination was not limited to intentional or direct discrimination, but differed on other points.

> A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member....

For example, if legislation guaranteeing benefits for illness exclude pregnancy, and pregnancy is an illness, women would be excluded from access to those benefits in a way men never would be, even though there is no explicit exclusion of women from receipt of benefits*.

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* Note that discrimination on the basis of pregnancy may be considered to be direct discrimination on the basis of sex. However, there has been considerable variance in the treatment of pregnancy by the courts and by tribunals and boards of inquiry, some of whom have rejected the direct discrimination view. The most notable example is the Supreme Court's dictum in Bliss that discrimination on the basis of pregnancy is not discrimination of the basis of sex. It may also be specified as a separate prohibited ground, as the proposed Alberta amendments to the Individual's Rights Protection Act would do and Quebec's Charter does.

Employment guidelines requiring employees to work on Saturday are also an example of disproportionate impact. They would mean that people of certain religions would not be able to accept the positions. Another example of disproportionate impact would be pension eligibility rules requiring people to have worked for forty years between the age of twenty and sixty-five. If such rules were to be established, they would mean that women would more likely be excluded from the pension because they would more likely have been out of the workforce for longer periods than men would have been in order to fulfill the social need of raising a family. Native people and the disabled with a far higher level of unemployment than the average would also be deprived of the benefit of the pension.

Policies or legislation may disadvantage the members of certain groups because past (and/or present) social conditions have prevented their taking advantage of the benefits available. The structure of society generally or a particular workplace, rather than any conscious decision, may be the cause of a current discriminatory result. This result may have manifested itself over a significant period of time, or it may be a predictable future consequence of current or new legislation or policies. Thus, if women do not enjoy the benefit of a law favouring veterans because only a certain percentage of the armed forces could by law be women, then the discrmination would result from the earlier institutionalized discrimination against women. The discrimination may be found either in law or in practice and may be a consequence of stereotyped views held about a particular group.

International Association of Machinists and Aerospace Workers, Local 2446 v. Brass Craft Canada, Ltd. (1983), 5 C.H.R.R. D/1964 (Ont.) illustrates constructive discrimination arising out of previous discriminatory treatment. Certain job classifications were occupied by men and others by women with there being only one instance of a female worker being given a job within a "male" classification. There were sex-segregated seniority lists related to the sex-classified jobs: "No male employee was ever recalled into a 'female' job and no female employee ever was recalled into a 'male' job". After a lengthy layoff, the company hired four female employees in the female classifications; all the female employees had been called back to work but three male employees had not been.

The Union filed a grievance even though it had accepted the segregated practice without complaint. In response the company eliminated the sex-based job classifications but retained the segregated seniority lists. The Board found for the male complainant. The lists were contrary to sections 4 and 10 of the Ontario Human Rights Code and therefore unenforceable even if considered a contractual term. This was constructive discrimination because it was not intended to discriminate against the men by not recalling them (and not recalling them was the point in issue, not the classifications); rather the failure to recall them was a consequence of the segregated lists, which themselves were direct discrimination.

McDonald v. Knit-Rite Mills Ltd. (1983), 5 C.H.R.R. D/1949, under the Manitoba Human Rights Code is also a case of constructive discrimination resulting from job classifications. When the company established job classifications in 1981, the complainant was classified in the lower of the two possible classifications for her position. Of eight employees to be classified, six men were classified in the senior category and two women, including the complainant, in the junior category. After considerable evidence about the complainant's work performance, the role of women in the company and the allocation of work by the company, the Adjudicator found for the complainant. He stated that Knit-Rite did not generally discriminate against women but that it was "obvious that stereotypical assumptions impacting on job role definition are not foreign to that environment". Even so, the job classifications were not "consciously" discriminatory:

> The sexual discrimination then practiced was more systemic, i.e. it was a part of the basic structure of the cuttingroom which over the years had resulted in unsubstantiated assumptions on what kind of work women could do and lower rates of pay for women than men, unjustified by reliable evidence of differences in value, capacity or effort.

The major (but not only) factor determining classification had been wage rates; persons earning approximately the same hourly rate had been classified together. Classification on the basis of wage rates was a neutral standard in that it was applied to both men and women; it had a more burdensome effect on women than on men, however, because they had always been paid less for reasons unrelated to merit.

(iv) Ambiguous cases

Some examples seem so clearly to be discriminatory that it may be difficult to see why they are considered as examples of constructive rather than direct discrimination. When the law or requirement specifies that it does not apply to one sex but applies to the other or denies benefits to people of a specific religion, there is a clear case of direct discrimination. Similarly, when a requirement makes no specific mention of age or religion or disability but a disproportionate percentage of people of a certain age or religion or with a particular disability cannot meet the requirement, there is no difficulty in characterizing the requirement as being constructive discrimination.

However, there are cases which straddle the line. Some ambiguous cases result in the United States from the policy that facially neutral laws may not be struck down under the 14th Amendment on the basis of unintentional negative effect, but may be struck down thereunder if there is an intent not obvious in the wording of the statute but which can be inferred from the application of the statute. Tribe describes these cases as follows:

> [administrative and executive decisions] may...display prejudice at a more fully disguised level, as for example, no official use is made of race or ancestry as a criterion, but the record leaves race or ancestry as in fact the only plausible explanatory factor (Tribe, 1025).

Yick Wo v. Hopkins, 118 U.S. 356 (1886) illustrates this doctrine. A municipal ordinance prohibited laundries without a licence. It was neutral on its face but administrators had granted licences to nearly all non-Chinese applicants but to none of the Chinese applicants. Invidious intent to discriminate on the basis of race and nationality was inferred from the pattern of administration. There was no other way to explain the practice than an intention to discriminate in the legislation.

In Soberal-Perez v. Heckler (U.S.C.A. 2nd C., August 30, 1983; unreported), the plaintiffs argued that the government's failure to provide social security instructions, information and advice in Spanish violated their constitutional right to equal protection of the law. Justice Pratt stated that "facially neutral conduct can constitute discrimination in violation of the Equal Protection Clause"; however, to find discrimination intent must be proved. In Heckler, it was held that there was a non-invidious purpose since "English is the national language of the United States".

A case which might be seen as direct or constructive is Anderson v. Martin, 375 U.S. 399 (1964), which involved a challenge to the requirement by the State of Louisiana that each candidate's race be designated on nomination papers and ballots. The Supreme Court seemed to treat this as direct discrimination because of the facial requirement explicitly referring to race or because a hidden intent to make race important could be inferred from the requirement. However, it is the effect on disadvantaged groups of this requirement (which applies to all races) which is important; on that view, the requirement is an example of disproportionate impact.

There would be no need to "dig below the surface" to find hidden intent if constructive discrimination were recognized, since the effect itself is the measure of whether there has been discrimination. It is a difficult, if not artificial task, to attempt to determine a legislature's intent in these circumstances. In Yick Wo, the disproportionate impact would constitute discrimination and the result would be the same in that case as it actually was. Anderson v. Martin would also have the same result. In Soberal-Perez, however, the result could be different under constructive discrimination doctrine since if the plaintiffs had been able to show adverse impact from the failure to produce Spanish language materials, there may have been a finding of discrimination and contravention of the equal protection clause.

(v) Under the Charter

Section 15 does not explicitly state that it does or does not prohibit constructive discrimination. However, the government of Ontario has taken the position that constructive discrimination claims can be advanced under section 15 and should be dealt with on the merits rather than disputed on the principle of whether constructive discrimination is encompassed by the term "discrimination" in section 15*. The basis for that approach is set out immediately below; a subsequent section notes some of the possible difficulties associated with the application of the concept.

(1) "Discrimination" can include constructive discrimination

This position is based on the development of anti-discrimination law, international law, and the approach taken to "effect" under the Charter by the Supreme Court of Canada and the Ontario Court of Appeal. As Judge Abella wrote,

> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

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* See statement by the Hon. Robert Welch, then Attorney General of Ontario, dated April 10, 1985, quoted above at pp.(xii)ff. See also the statement of the Hon. Alan W. Pope, Attorney General, on the introduction of the Equality Rights Statute Law Amendment Act, 1985 (Hansard, June 11, 1985, p.139).

> This is why it is important to look at the results of a system. In these results one may find evidence that barriers which are inequitable impede individual opportunity. These results are by no means conclusive evidence of inequity, but they are an effective signal that further examination is warranted to determine whether the disproportionately negative impact is in fact the result of inequitable practices, and therefore calls for remedial attention, or whether it is a reflection of a non-discriminatory reality (Abella Report, 203).

It should be emphasized, as this passage does, that it is not the disproportionate impact itself which constitutes the discrimination but the reasons for the impact which may constitute discrimination. Thus it is not that more members of group A are affected by a law than are members of group B which is important, but whether the reason for the difference is related to the specific characteristics of the members of group A. In the example of the veterans' preference law, the disproportionate impact on women alerts one to the possibility of discrimination; it is the fact that women were precluded from or less likely to be veterans because of systemic factors that constitutes the discrimination.

Although the case was reversed on appeal, the principle articulated by Professor Cumming in the Bhinder case (Tribunal decision) indicates the importance of recognizing constructive discrimination and the problems of requiring proof of intent, malicious or otherwise. After canvassing the caselaw on constructive discrimination, Professor Cumming said:

> The issue as to whether intent is an element of discrimination consistently arises in those cases where an apparently neutral specification results in adverse

> consequences for a member of a class of persons protected under human rights legislation. In such cases, it will be rare that the requirement is enacted to maliciously or purposely exclude persons on a prohibited ground. However, to protect against such an eventuality, it is necessary that complaints be found to be valid, notwithstanding that respondents have not acted with intent. Malicious intent is difficult or impossible to prove where an apparently neutral specification results in adverse consequences. If proof of intent were required, a most confounding subversion of the principles enshrined in human rights statutes might well occur. As well, from a policy standpoint, human rights legislation is directed against discriminatory effects, results or practices in society, and although motive is a relevant issue in a discrimination case, motive is not a necessary prerequisite to a finding of discrimination in breach of the legislation. (Emphasis added.)

These comments indicate the difficulty with the meaning of intent since they seem to refer specifically to malicious intent, or motive, rather than intent as awareness of the consequences of one's actions. However, Professor Cumming does use the terms "maliciously or purposely", the latter of which appears to mean intent as awareness of the effect of one's actions. And the emphasis in Bhinder is on result, regardless of the type of intent involved.

The development of the constructive discrimination doctrine as set out above shows its significance to the fulfillment of the objectives of anti-discrimination legislation. The desire of boards and courts to distinguish cases from O'Malley and Bhinder emphasises this recognition. Permitting constructive discrimination to be redressed under section 15 would be consistent with the apparent purpose of the

Charter to offer constitutional protection to disadvantaged groups, in particular, the disabled, women and religious minorities.

The absence of an explicit statement to show either that constructive discrimination is prohibited by section 15(1) or that intentional discrimination only is prohibited, leaves section 15(1) ambiguous in this respect.

Most of the contexts in which it has been held that constructive discrimination is prohibited involve legislation which has expressly prohibited it. The English Sex Discrimination Act and the Race Relations Act both explicitly prohibit constructive discrimination. Other countries have similarly expressly prohibited constructive discrimination. For example, the Luxembourg legislation respecting equal treatment for men and women in employment prohibits the use of terms in conditions or criteria "which, although lacking explicit reference to the person's sex, result or in imply discrimination on grounds of sex". Dutch law also prohibits constructive discrimination in employment law; one example cited is that reference to "bread winner" in payment of bonuses will be null and void in so far as it results in discriminatory effects by making them available primarily to men (92 EIRR (Sept'81), 21). The Norwegian Act respecting equality between the sexes proscribes "any act whose practical effect is such that one sex is unreasonably placed at a disadvantage in relation to the other". The South Australia Sex Discrimination Act proscribes constructive discrimination by using the disproportionate impact approach.

In Ontario, Lacourcière J.A. was of the view in O'Malley that the amendment to the Ontario Human Rights Code explicitly prohibiting constructive discrimination (section 10 of the 1981 Code) was significant in this respect: "If the legislature had intended before 1981 to prohibit discriminatory results regardless of motivation or intent, it could easily have used the language adopted by congress in its Civil Rights Act of 1972 or the language now adopted in s.1] of the Ontario Human Rights Code". The same point was made by the majority of the Federal Court of Appeal in Bhinder. And where it is not expressly prohibited under the equal protection clause of the 14th Amendment, the United States Supreme Court has not upheld constructive discrimination cases.

International law is of assistance in resolving the ambiguous wording of section 15. In R. v. Videoflicks Tarnopolsky, J.A. stated "unless the domestic law is clearly to the contrary, it should be interpreted in conformity with our international obligations". However, it should be noted it is not unanimously held that international law is available to help resolve ambiguity in a constitutional document. (The role of international law as an interpretive device has been considered above at pp.50-57.)

Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) states that "discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women...of human rights and fundamental freedoms..." (emphasis added). The wording of Article 1 alone indicates that constructive discrimination is encompassed by the term "discrimination"; however, other articles reinforce this interpretation. As mentioned above, Canada and each of its provinces agreed to implement this Convention and therefore may be considered to be in agreement with its broad prohibition against discrimination.

Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination also proscribes constructive discrimination:

> In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (emphasis added).

As is the case with CEDAW, Canada and all of the provinces agreed to implement this Convention.

The wording of Article 26 of the International Covenant on Civil and Political Rights (ICCPR) resembles section 15 of the Charter more than it does Article 1 of CEDAW; yet it has been interpreted to prohibit constructive discrimination. Article 26 reads in part

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law...the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex....

The common interpretation of ICCPR by the Continuing Federal-Provincial-Territorial Committee of Officials Responsible for Human Rights concludes that "the phrases 'equal protection' and 'equal and effective protection' are sufficient to protect the right to equality in the operation of the law". For example, Article 26, in conjuction with Articles 17 and 23 of ICCPR, supported a claim of constructive discrimination in the Mauritian Women case. A Mauritian law required alien husbands but not alien wives of Mauritian nationals to obtain residence permits. This constituted constructive discrimination against the women because they would have husbands as spouses and men would not. Section 17 prohibits, inter alia arbitrary or unlawful interference with privacy and family and section 23 specifically sets out the rights of family and marriage.

Although in many cases, constructive discrimination has been explicitly prohibited by legislation in other jurisdictions and although the courts in both O'Malley and Bhinder based their decisions in part on the lack of an explicit prohibition in the Ontario Code and the Canadian Act, general rules of constitutional interpretation must be applied to the lack of explicit wording in the Charter. The Charter is a constitutional document requiring a "broad, liberal interpretation", not the narrow statutory construction carried out in O'Malley and Bhinder*.

Another relevant aspect of the Charter relates to the comments made by Kroft J. in Osborne. He distinguished the Manitoba legislation from the Ontario and Canadian statutes in part by the "general and result-oriented" nature of the Manitoba legislation and what he found to be the "narrow and regulatory" character of the Ontario and Canadian legislation. The Charter can be described as "general and result-oriented" rather than "narrow and regulatory".

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* Indeed, this emphasis on wording of the statutes may in itself be inconsistent with the broad interpretation which should be afforded human rights legislation.

In addition, in Canada Safeway, the Board of Adjudication distinguished the Manitoba legislation from the Ontario Code on the basis that the former contains a saving provision. The lack of a saving provision in the Ontario Code was one reason given by Lacourcière J.A. for the holding in O'Malley. Section 1 of the Charter constitutes a "saving provision" which would permit the government to justify constructive discrimination, just as it can justify direct discrimination. Thus there is no need to be concerned that there will be a "strict liability" or similar burden imposed on the government for unintended actions. In the United States a finding of discrimination on grounds of race will inevitably mean legislation will be struck down under the equal protection clause; this seems to explain in part the reluctance of American Courts to accept the doctrine of constructive discrimination under the 14th amendment. However, under the Charter, section 1 will allow the government to defend discrimination, a major difference between the U.S. and Canadian constitutions.

The guarantee under section 15 of "the equal benefit of the law" may also help to substantiate an argument that section 15 prohibits constructive discrimination. Although it can be argued that this clause was included in section 15 as a response to the Supreme Court of Canada's decision in Bliss (see above, pp.207-208), it might be interpreted to mean that an individual who has been deprived of a right or opportunity because an ostensibly neutral law in fact excludes him, has been deprived of the equal benefit of that law. On this view, it would be argued that the law has been written or implemented in such a way that it does not benefit persons "equally" and that a reason for the unequal benefit -- or enjoyment -- of the law can be traced to the individual's membership in a protected group.

We also have strong indication that effect will be an important factor under the Charter on the basis of R. v. Videoflicks which was a unanimous decision of five members of the Ontario Court of Appeal (on appeal to the S.C.C.). That case concerned the validity of the Sunday Closing provisions in the Retail Business Holidays Act and, inter alia, was particularly concerned with whether they contravened the Charter's guarantee of freedom of conscience and religion. Mr. Justice Tarnopolsky writing the judgment for the Court, explicitly stated that under the Charter, the Court is to look at the effect of legislation. After discussing the relevance of effect in distribution of power cases, he says

> "the interpretation of the Charter necessarily requires an assessment of the 'effect' of impugned legislation" (emphasis added).

He points out that direct contraventions of the Charter will be rare:

> An adverse impact, however, can occur as a result of the operation and enforcement of legislation or even because of its intended scope. To ignore the "effect" of the Act in issue before this Court would be to ignore reality and to concede the rights of the individual or a minority to the interests of the majority, even if these interests appear legitimate as far as the majority are concerned.

Section 15 in particular is concerned with the rights of the minority vis-à-vis the majority.

Later in the judgment, he uses the phrases "impact in an indirect sense" and "adversely impacts." Although these statements are made in reference to sections of the Charter other than section 15 and are dicta, he appears to assume that constructive discrimination is prohibited by section 15. He suggests in obiter that if "such adverse impact as to constitute discrimination [existed in this case] it would be more appropriate to consider the matter in the context of s. 15 of the Charter". The latter comment should be read in conjunction with an earlier comment about the regulation of time and place made in relation to section 2(b) of the Charter. "Mere regulation as to time and place, however, cannot be considered an infringement of freedom of expression, unless there is evidence that such regulation in intent or effect adversely impacts upon content or adversely interferes with production, availability and use or determines who can be involved in these" (emphasis added).

In Big M Drug Mart, Dickson J. (as he then was), speaking for four other members of the Court*, states that "either an unconstitutional purpose or an unconstitutional effect can invalidate legislation", although it will be necessary to examine the legislation's effect only when it has been determined that it has a valid purpose (p.513). With specific reference to the Lord's Day Act, at issue in that case, the Chief Justice maintained that "[t]he protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity" (p.518). Madame Justice Wilson took an even stronger position on this issue, stating that the Charter is "first and foremost an effects-oriented document" and "so long as a statute has such an actual or potential effect [of impinging on a right], it does not matter what the purpose behind the enactment was" (p.536). The Lord's Day Act applied to members of all religions but did not take into account the needs of religions other than Christianity; it had a disproportionately negative impact on persons whose religious beliefs include a non-Sunday sabbath.

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* Only six Justices took part in the judgment.

(2) Some difficulties associated with the application of constructive discrimination

The principle that constructive discrimination should be prohibited under the Charter is a significant one. However, the practical application of the concept raises concerns, some of which are addressed here.

The guarantee of rights to an individual under section 15(1) is in contrast to s.15(2) which speaks of "individuals or groups". The right to equality is, therefore, an individual right and not a group right. The doctrine of "constructive discrimination" or "disparate impact" states that discriminatory intent against an individual need not be shown when a law has a disparate impact on a protected group. It may be said that in disparate impact cases the courts consider, not whether the claimant as an individual had been classified on the basis of a prohibited ground, but whether a facially neutral law had an adverse impact on the protected group to which the individual belongs.

Thus, while direct discrimination cases focus on the way in which an individual has been treated, disparate impact cases are concerned with the protected group (see Furnco Construction Corp. v. Waters, 98 S. Ct. 2943 (1978) (Marshall, J. concurring) and Connecticut v. Teal, 102 S. Ct. 2525 (1982) (Powell, J. dissenting)). Disparate impact claims are based on whether the group fares less well than other groups. For example, a veteran hiring preference will exclude both male and female non-veterans. An individual male non-veteran could not challenge the veteran hiring preference as discrimination based on sex, but if the doctrine of constructive discrimination were adopted an individual female non-veteran could, despite the fact that both individuals were excluded for the same reason (i.e. non-veteran status) and the impact on them is identical (i.e. both were denied employment). The woman's claim of constructive discrimination would be based on the fact that the preference has a greater impact on women "as a group" than it has on men "as a group". There are two points to be made here. The first is that the reason more women are exluded from the benefit of veterans preference rules is that women did not have the same opportunity as men to become veterans. Therefore, men and women have not had the same history in this respect. Furthermore, a woman challenging such a rule would herself have to have been refused employment as a consequence of the operation of the rule -- the requirement of denial of equality to an individual would be met. Thus the same principle applies as in direct discrimination: the individual has been denied a right as a result of a particular prohibited characteristic.

There is some concern that recognition of constructive discrimination will increase the number of cases before the courts and will result in the striking down of many laws and programs. In Washington v. Davis the United States Supreme Court warned that "a rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white". Add to race the other classifications specifically enumerated in s. 15(1) of the Charter (and others which are not), and the implications of recognizing constructive discrimination may expand. As Justice Rehnquist recognized in Jefferson v. Hackney, "given the heterogeneity of the Nation's population, it would be only an infrequent coincidence" when a law did not have a disproportionate impact on some group. However, under the Charter, section 1 permits the government to justify infringements of rights. Thus while it is correct that more cases will be heard if section 15 prohibits constructive discrimination, the consequences need not be that the legislation or policy is automatically struck down as constructive race discrimination would likely be in the United States.

There is also the fear that the courts may attempt to replace the judgment of the legislature with their own. One example illustrates this particular concern: most pension plans establish delayed vesting, that is, the contributors become entitled to a pension at retirement only after they have worked for the employer for a specified period of time, say, ten years. If they leave the employer before the ten years has elapsed, they receive only a return of their own contributions. This ten year delay may have a disproportionate impact on women who are less likely than men to work in one place for ten years. In establishing a remedy in such a case, it is argued, the courts might begin to calculate the proper period for vesting and impose it on the government. But the Supreme Court has already indicated that it does not intend to rewrite legislation (Hunter v. Southam). That task remains with the legislature.

However, acceptance of the argument that the important question under section 15 of the Charter is the effect of legislation or activity, regardless of intent, would most fully recognize and extend equality rights to certain groups in Canadian society against whom there is little direct legislative discrimination, but who argue that they are subject to a considerable amount of constructive discrimination. In particular, the disabled and women are subject to constructive discrimination; however, as the Bhinder and O'Malley cases themselves indicate, religious discrimination may also often take a constructive form. While it is true that a recognition of constructive discrimination would increase the numbers of cases coming before the court, this argument loses some of its strength when one considers that the characterization of a particular form of discrimination may be termed direct or constructive, depending on the focus of argument. This is particularly true if the courts are prepared to look for hidden intent, as they are in the United States. It is also true if one assumes that hundred percent correlations actually constitute direct discrimination, as in the case of pregnancy. A recognition of constructive discrimination would result in the broadest scope of protection for minorities under section 15 and would also be consistent with the development of human rights law in Canada during recent years.

SUMMARY OF PAGES 298-315

5. The treatment of the enumerated grounds

Issue is whether discrimination on all grounds should be subject to the same standard of review under section 1.

Discussion of the treatment of various grounds by witnesses before the Joint Committee, suggesting that discrimination on certain grounds be scrutinized more strictly than oh other grounds, and of the American jurisprudence in which certain ground do receive strict scrutiny while most grounds receive minimal scrutiny.

(a) Approach 1: Different Classes, Different Tests

This view holds that discrimination on certain grounds should be subject to a stricter standard of review than discrimination based on other grounds, such as race. Discrimination based on race (for example) is frequently hostile and therefore deserves strict review, while discrimination based on other grounds may be paternalistic and might be said not to require equally rigorous scrutiny in all cases.

Supported by section 27 and section 28 of the Charter, by academic writings and by American jurisprudence.

(b) Approach 2: One section, One test

This view holds that all the grounds should be subject to the same standard of review under section 1. Based on lack of differentiation in section 15's enumeration of the different classifications.

Implications of the Approaches

Approach 1 would permit government to justify discrimination on some enumerated grounds more easily than discrimination on other enumerated grounds. Approach 2 would make it equally difficult for government to justify discrimination on any of the enumerated grounds.

5. The treatment of the enumerated grounds

The anti-discrimination clause in section 15(1) enumerates certain protected grounds. Some of these grounds have been treated differently from other grounds in human rights and U.S. caselaw. In particular, discrimination on the basis of age and disability have been subject to less strict examination than have discrimination on grounds such as race and colour. Discrimination on the basis of sex has been treated in various ways, often less rigorously than racial discrimination. Section 15 gives no indication that the enumerated classes are to be treated differently from each other. Nor does section 1 indicate that a different test should be imposed on government in relation to some grounds, although it will no doubt be easier to produce evidence that an infringement of certain of the grounds is justified than is the case for other classes.

Prior to setting out two approaches to this issue, we consider two sources relating to the treatment of the listed grounds: testimony before the Joint Committee and American caselaw.

(a) Sources

(i) Joint Proceedings

Several of the groups appearing before the Joint Committee recommended that various grounds be treated differently. Most of the witnesses appeared to apply the distinction at the section 15 stage rather than at the section 1 stage. The distinctions would have resulted in a higher onus being placed on government in justifying an infringement on the basis of sex or race, for example, than on a plaintiff claiming an infringement on the basis of, say, age.

The National Association of Women and the Law recommended the following:

> 15(1) every person shall have equal rights in law including the right to equality before the law and to the equal protection and benefit of the law; and
>
> (2) a compelling reason must be shown for any distinction on the basis of sex, race, national or ethnic origin, colour or religion (Joint Proceedings, 22:59).

Some discrimination on the specified grounds would be allowed under this test. The Canadian Advisory Council on the Status of Women also suggested a specific section 15, subsection (1) of which was the same as suggested by NAWL, followed by:

> (2) Such equal rights may be abridged or denied only on the basis of a reasonable distinction. Sex, race, colour, national origin or religion will never constitute a reasonable distinction except as provided in Subsection (3) (Joint Proceedings, 9:127).

Accordingly, no discrimination on those grounds specified would be allowed, except to allow affirmative action as provided for by subsection (3) (Joint Proceedings, 9:138).

It is apparent from the testimony that the women's groups were concerned that if no standard were specified, a reasonable ("rational basis") standard might be applied to all groups with the result that stereotypical assumptions about sex might influence the courts' treatment of sexual discrimination. These groups were concerned lest the confused state of American practice would be imported into Charter jurisprudence (Joint Proceedings, 9:127 and 151: also 22:67-68).

Although the Committee did not vote on a two-tier test, there was sufficient discussion around this point that Parliament could have included it in the Charter, yet did not. A proposed amendment to establish the dual standard was withdrawn when the amendments to extend the enumerated grounds were rejected (Joint Proceedings, 48:20). This could be read as a rejection of a two-tier or dual standard test, particularly since section 1 appears to establish a single test in relation to all sections, including section 15. It may be, however, that the federal government expected the courts to apply different standards to different grounds. According to the Deputy Minister of Justice, the use of "in particular" underlines

> that there are some grounds which are more invidious than other grounds.
>
> ...
>
> It would be open to the court to add to the list...But perhaps the test which would apply there would have to be a higher one than the test which may be applied in the case of those grounds which the clause does underline (Joint Proceedings, 41:24).

The application of the term "higher" test to the added grounds suggests that the higher onus would be on the plaintiff (to prove discrimination) at the section 15 stage. The alternative would be to impose a lower standard on the government to justify an infringement of the equality rights of a member of an unenumerated (but judicially recognized) group than to justify an infringement of the equality rights of a member of an enumerated group.

(ii) The American Experience Considered

The idea of treating grounds of discrimination differently has been applied in the United States under the 14th Amendment equal protection analysis. The equal protection clause of the Fourteenth Amendment of the United States Constitution simply provides that "No state shall...deny to any person within its jurisdiction the equal protection of the laws".

Constitutional adjudication under a provision as vague and open-ended as the U.S. equal protection clause forced the courts to balance competing interests with claims to judicial protection, and so the courts proceeded cautiously in choosing which among those interests were to receive special constitutional recognition. Section 15 of the Charter, however, singles out particular groups for special protection; to this extent the balancing process has already been performed. There are, of course, countless other forms of discrimination which are not expressly enumerated, and the language of s. 15 provides for the possibility of judicial review of discrimination based on "non-enumerated" grounds as well, although this question will not be dealt with in this part.

Remembering the Supreme Court of Canada's caveat that "American decisions can be transplanted to the Canadian context only with the greatest caution" (Southam, p.161), the aspect of American equal protection analysis which might be useful to Canadians is that which centres on the criteria that determine the bounds of reasonable classification. How can the court identify those instances where discrimination based on an enumerated ground is justified? Although American equal protection doctrine is still in flux, a basic "two-tiered" framework has emerged.

The "rational basis" test (or "minimal scrutiny") is applied to the bulk of legislative classifications (for example, age-based classifications: Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562 (1976); Vance v. Bradley, 440 U.S. 93 (1979)). The action of the legislature is presumed to be valid and the statute is upheld if the means are rationally related to any legitimate state goal.

> And usually that rational classification requirement was readily satisfied: the courts did not demand a tight fit between classification and purpose; perfect congruence between means and ends was not required; judges allowed legislators flexibility to act on the basis of broadly accurate generalizations and tolerated considerable overinclusiveness and under-inclusiveness in classification schemes (Gunther, 670).

The "strict scrutiny" test is applied to protect "suspect classes" from discriminatory legislation. Under this standard, the legislation will be upheld only if the government can demonstrate that its legislative objective was compelling, and that the means chosen to reach that objective are necessary, that is, that the same result could not have been achieved by more carefully tailored legislation. Strict scrutiny is applied to legislation which classifies on the basis of race or national origin.

The result of the two-tier approach was scrutiny that was either "'strict' in theory and fatal in fact...[or] minimal scrutiny in theory and virtually none in fact" (Gunther, 671). Although the two-tiered analysis has not been formally abandoned "[i]n fact, the modern exercises of review in equal protection cases do not conform to that simple, bifurcated pattern" (Gunther, 672). The most important addition has been a third "intermediate" level of scrutiny, a compromise developed to accommodate the Supreme Court's refusal to accept sex as a suspect class subject to strict scrutiny (Craig v. Boren, 429 U.S. 1970, 97 S.Ct. 451 (1976)). For a statute to survive this intermediate test the government must show that it furthers an important government objective and that there is a substantial relationship between the classification and the legislative objective. Application of this test by the judiciary has been uneven, with certain judges applying it as if it were the strict scrutiny test, and other judges being as deferential as they are under the rational basis test.

The mounting discontent with the two-tier framework has led one judge, Thurgood Marshall, to enunciate a "sliding scale" test which he believes is a more accurate description of the inquiry that the court has undertaken. He believes that the court applies "a spectrum of standards" in reviewing legislation and that the inquiry should focus upon:

1) the character of the classification in question;

2) the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive;

3) the state interest asserted in support of the classification (Murgia, 2569).

On the opposite end is Justice Stevens who claims that a single standard applies to all equal protection cases. In Craig v. Boren, he stated that "[t]here is only one Equal Protection Clause...It does not direct the courts to apply one standard of review in some cases and a different standard in another case."

The Canadian courts will also have to consider whether they should apply a single test under section 1 in relation to all the enumerated grounds or whether to apply different tests depending upon the ground which is the basis of the infringement. The approach taken will depend on a consideration of the implications of the single test and different tests alternatives.

The ordinary observer glancing at the six enumerated grounds will immediately note that they are not _ejusdem generis_. Individuals who would be horrified by the notion that the right to vote should be denied because of a person's race or sex, have little difficulty accepting a law which denies persons under eighteen years the right to vote. Ultimately, our goal must be to develop a test, or tests, which can deal with all of the enumerated grounds in such a way that the common sense expectations of the ordinary observer will be realized.

One way of looking at the various enumerated classes of discrimination is to distinguish them on two main grounds: 1) Historical patterns of animus and 2) Accuracy of generalizations. This view is presented here as further background to the discussion of approaches in the next section.

(1) Historical Patterns of Animus

Racial and religious discrimination have often been based on feelings of hostility and intolerance. Age discrimination, and discrimination against persons with a mental or physical disability, on the other hand, may more easily be seen as often based on erroneous assumptions about the effects of age or handicap on ability (Note, Harv. L.R., 383-4; Tarnopolsky, Discrimination, 228).

This is not to suggest that the aged and disabled have not suffered from the discrimination directed against them; in particular, in employment, significant deprivations have been imposed. But the effect of racial hostility, at least in the United States, has been to exclude the often despised group from participation in the political process.* As a result, the American courts have interpreted the equal protection clause as a mandate to provide these isolated groups with extraordinary protection from the majoritarian political process.**

The American courts have refused to extend this extraordinary protection to persons discriminated against on the basis of age. The rationale for this distinction is that although "the treatment of the aged...has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment'" (Murgia; Vance v. Bradley).

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* For a summary of the historical background of voting discrimination in the United States, see South Carolina v. Katzenbach, 282 U.S. 301 (1966) per Chief Justice Warren, and see Schmidt, Principle and Prejudice.

** "...[P]rejudice against discrete and insular minorities may be a special condition which tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry" (Carolene Products, note 4).

The 'history of purposeful unequal treatment' has not been the same in Canada as in the United States. The fact that the American equal protection clause was the product of a war against slavery, while section 15 of the Canadian Charter is the product of quieter times, might limit the value of the American jurisprudence on this point.

(2) Accuracy of Generalization

There is nothing inherent in race, colour, religion or national or ethnic origin that supports any correlation between those characteristics and ability: "To be sure, every decision based on race is not economically irrational in the sense that it lacks support in a statistical correlation between race and ability to perform well at a particular job. But...the source of any correlation must be found in factors such as past discrimination, cultural deprivation, history or the like" (Note, Harv. L.R.). Sex is different. Although there are numerous racial and ethnic groups, with respect to sex there are only two possible classifications, and it is far easier to define who is a male or female than to define membership in a race or ethnic group. With respect to characteristics considered to be sex-specific, those characteristics attach to virtually all members of each group. As a result, there is a correlation between sex and certain abilities (e.g., the ability to become pregnant*).

Age is different again. "Age is at some point inherently related to ability" (Note, Harv. L.R.). There is a general relationship between advancing age and decreasing physical ability. At the opposite end of the age spectrum, there is an age below which no one, no matter how precocious, has the maturity or mechanical ability to control a motor vehicle. Finally, mental or physical disabilities are, as the word "disability" makes clear, inherently related to ability.

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* For a specific illustration, see Swinton, "Regulating Reproductive Hazards in the Workplace".

These distinctions may be significant factors in establishing the appropriate analysis for Canadian courts to apply when considering a section 15 equal protection claim. In discussing this issue the analysis begins with what seems to be an undisputed assumption: that the courts should and will subject legislative classifications based on race to the most intensive review--that the onus will be on the government to demonstrate that its objective was compelling and that the means chosen to meet that objective are necessary, that is, the same result could not have been achieved by more carefully tailored legislation. Should this same level of judicial review be applied to each of the classes enumerated in section 15 of the Charter, or do the differences between these classes require the court to undertake different levels of scrutiny?

(b) Approaches

(i) Approach 1: Different Classes, Different Tests

The first argument in support of this approach is that the factual differences between the enumerated classes invite different levels of judicial scrutiny. The hostile motivation historically behind discrimination based on race, and some other grounds, should compel the courts to be especially suspicious and strict when reviewing legislation which discriminates on these grounds. By contrast, the motivation behind discrimination based on age and mental or physical disability has usually been paternalistic, the (albeit misguided) intention being not so much to disadvantage these groups as to protect them. It can be argued that such persons are not so politically powerless that they require extraordinary protection from the majoritarian political process.

It has been argued as well that there is a distinction between maximum age classifications and minimum age classifications. "[T]he members of the class disadvantaged by a maximum age classification suffer permanent injury; unlike membership in minimum age classifications, 'maximum age' class membership, once achieved, is never lost. Consequently, it is argued that it is reasonable to scrutinize this classification more carefully than one involving minimum age" (Larkin, 1976)*.

It is argued that these distinctions support a "two-tier" or perhaps a "sliding-scale" equal protection framework. Intensive review for discrimination based on race, national or ethnic origin, colour, religion and, if the American experience is not followed, sex, and some lower level of scrutiny akin to intermediate scrutiny for discrimination based on age and mental or physical disability.

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* On the other hand, persons subject to "minimum age" classifications are generally under eighteen years of age, and are therefore unable to vote. They may not be a "despised minority", but they certainly are excluded from participation in the political process, and this fact should entitle them to extraordinary protection from the majoritarian political process. As well, although individuals in the minimum age group will move out of it as they grow older, that group, as a group, remains disadvantaged as long as the discriminatory rule is in effect.

Although section 15(1) makes no distinction between the several enumerated classes, support for the "two-tier" analysis can be found in other sections of the Charter. Section 27 of the Charter provides:

> This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

A person's race, national or ethnic origin, colour and religion are the fundamental ingredients of his or her multicultural heritage. In R. v. Videoflicks, Tarnopolsky J.A., delivering the opinion of the court, referred to section 27 of the Charter and stated: "Religion is one of the dominant aspects of a culture which it is intended to preserve and enhance". Mr. Justice Dickson (as he then was) also cited section 27 in relation to freedom of religion in Big M Drug Mart (p.519).

Similarly, section 28 provides:

> Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

The inclusion of sections 27 and 28 of the Charter, both of which are free of the non obstante clause in section 33, may demonstrate a conscious understanding on the part of the framers of the Charter that these particular characteristics were of unique constitutional importance. Read together, sections 15, 27 and 28 can support the conclusion that classifications based on race, national or ethnic origin, colour, religion and sex require more intensive judicial review than classifications based on age and mental or physical disability.

Professor Tarnopolsky (as he then was), has suggested that a two-tier framework would be appropriate for the grounds of discrimination enumerated under section 15. He states that "in light of the fact that some of the listed grounds, such as age and mental or physical disability, are clearly subject to bona fide qualifications or requirements, a less stringent test might be applied to these grounds similar to that of 'intermediate scrutiny' in the United States" (Tarnopolsky "Equality Rights", 254, 255; Hogg, Canada Act, 51). The intuitive feeling that age and disability differ from the other enumerated grounds, coupled with the fear that a single level of scrutiny will lead either to twelve year old voters or less judicial protection for racial minorities, makes the two-tier framework a credible approach.

Implications of this Approach

A "two-tier" or "sliding-scale" equal protection framework could accommodate the common sense expectations of the ordinary observer. Race-based classifications will invariably be struck down under the more intensive review. Classifications based on age or disability will more likely be upheld under the less intensive review. The right to vote provides a good example. Since there is no correlation between race and the ability to vote, a voting law which discriminates on these grounds will be invalidated under strict scrutiny. But the existence of persons under the age of 18 who could intelligently cast a ballot would not invalidate an age-based voting law because the lower level "intermediate" scrutiny does not require a perfect fit, only a substantial relationship between the classification and the government objective.

(ii) Approach 2: One Section, One Test

Justice Steven's admonishment that "[t]here is only one Equal Protection Clause...It does not direct the courts to apply one standard of review in some cases and a different standard in another case" (Craig v. Borens) is equally applicable to the Canadian Charter. In fact, as indicated, an examination of the negotiations which preceded the proclamation of the Charter demonstrates that explicit recognition of a two-tier framework was considered but rejected.

Even so, many people have some difficulty with the notion that a single level of scrutiny can be applied to all of the classes specifically enumerated in section 15. Rejection of a single level approach to equal protection is generally predicated on the fear that the application of strict scrutiny to age and mental or physical disability will frustrate the common sense expectations of the ordinary observer. But closer examination will reveal that this fear is unfounded. In fact, strict scrutiny can apply to such different classifications precisely because of their difference.

Strict scrutiny is fatal to racial classifications because there is no inherent correlation between race and ability. But as the correlation between a characteristic and ability rises, so too does the likelihood that use of that classification will survive strict scrutiny. Age is at some point inherently related to ability, and so some age-based classifications are likely to survive strict scrutiny. Mental or physical disability is inherently related to ability, so that even under the strictest scrutiny a disability-based classification will survive if it is based on an accurate assessment of the disability.

Disability-based classifications will make up the easiest cases. For example, a law prohibiting blind people from operating a motor vehicle could withstand strict scrutiny: the compelling government objective is public safety, and the statistical fit is perfect, there are simply no blind persons capable of safely operating a motor vehicle. Strict scrutiny will only invalidate those laws based on erroneous assumptions about the effects of disability on ability.

Age-based classifications do not lend themselves to easy solutions. The minimum voting age presents the greatest dilemma because it involves not only an age-based classification, but a fundamental right guaranteed by section 3 of the Charter. No one would deny that there are persons under the age of eighteen who possess the knowledge and maturity necessary to register an intelligent vote. Denying such minors the right to vote simply because of their age is a prima facie violation of section 15 of the Charter. Would not the strict scrutiny test require the government to abandon the age-based classification and replace it with an age-neutral classification based on ability?

The strict scrutiny test requires a compelling government objective--in this case the government interest in promoting intelligent and responsible exercise of the franchise. The next question is whether the means chosen are necessary, that is, that the same result could not have been achieved by more carefully tailored legislation. On the assumption that maturity and experience are relevant to intelligent and responsible voting, a minimum age law really is the only means acceptable in a "free and democratic society". The only alternative would be individualized testing, and any scheme that tried to test maturity of political outlook on a case by case basis would be both undesirable and unworkable. What would the criteria be? Not literacy, because illiterate people can be both intelligent and responsible. And how would one fashion a test that was not dangerously subjective? In Katzenbach, Chief Justice Warren described the various "literacy" and "good character" tests "designed to deprive Negroes of the right to vote". Individualized determinations are not a viable alternative, and, therefore, unless the government grants infants the right to vote, some age cut-off must be chosen.

Once it is agreed that an age-based classification is necessary to achieve the compelling government objective, the only question left is, "what age?" Why not seventeen years old, or sixteen? Once the courts accept the fact that an age-based classification is demonstrably justified, they will likely defer to the legislature's decision regarding the demarcation so long as it falls within a reasonable range.

For the court to defer to the legislature is, admittedly, a departure from the strict scrutiny test as applied by the United States Courts. There really is, however, no verifiable basis for justifying any given age as the appropriate demarcation for obtaining the franchise. To test whichever age is chosen by the "'compelling interest' standard is really to deny a state any choice at all, because no state could demonstrate [the necessity of] drawing the line with respect to age at one point rather than another": Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260 (1970).

To that extent, perhaps this position acknowledges that age must be treated somewhat differently from the other enumerated classes. But this unique treatment is only at the secondary stage, after a finding has already been made that an age-based classification is necessary.

The minimum driving age presents a slightly different problem. In this situation the government already makes determinations on a case by case basis by requiring people to pass a driving test. Why does the government not permit individuals under sixteen years of age to demonstrate their driving skills? The answer is that a driving test is a limited practical measure of maturity and judgment. Because these are relevant to safe driving, a minimum age law is the safest practical predictor of these characteristics. A similar analysis can be applied to almost all restrictions imposed on minors.

Implications of this Approach

The foregoing analysis demonstrates that many age based classifications and even more disability-based classifications will survive even the most intensive review. A student of American constitutional law might find this result somewhat suprising, because in the United States strict scrutiny is "strict in theory and fatal in fact"*. But that is because the Americans apply strict scrutiny only to classifications based on race or national origin. And as we have already observed, the correlation between these classifications and ability is non-existent. It is precisely because age and mental or physical disability are often closely related to ability that classifications based on these grounds will often survive strict scrutiny.

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* Exceptions to this pattern are Korematsu v. United States, 323 U.S. 214 (1944) which upheld a military order during World War II excluding all persons of Japanese ancestry from designated West Coast areas, and Fullilove v. Klutznick, 100 S.Ct. 2758 (1980), upholding a Federal government affirmative action program.

Thus, a single level of intensive review will accommodate the common sense expectations of the ordinary observer. If the foregoing analysis is correct, many cases will be decided the same way whether age and disability are subject to strict scrutiny or intermediate scrutiny. And, of course, if a statute will survive strict scrutiny, the judges need never decide whether a less exacting level of review is appropriate.

SUMMARY OF PAGES 317-348

6. The treatment of non-enumerated grounds

Discussion of the kind of principles which might guide judicial recognition of non-enumerated groups or grounds based on statutory protection already granted a ground; the near-immutability of a ground; the general policy underlying non-discrimination (pattern of discrimination on the ground has occurred); the purpose of the Charter in protecting the individual against the state and the minority against the majority (the role of members of the group in the political process); the discrete character of the group; and the non-economic nature of a ground.

Discussion of how principles will be applied by the courts.

Discussion of the standard of review to be applied to non-enumerated groups under section 1.

Discussion of examples of enumerated grounds which might be recognized by the courts, including political belief, marital status, economic status, social condition and family status.

6. The treatment of non-enumerated grounds

The issues here are how the courts will determine which groups to add to the list of protected grounds and how they will apply section 1 to the groups they do recognize. Again, this paper considers some preliminary matters before setting out the different ways the non-enumerated rights might be treated. The discussion is completed by considering some examples of cohesive groups or classifications which are likely to receive judicial attention. It should be remembered that the nature of the groups "added" is of more significance if section 15 is considered an anti-discrimination provision rather than a broad guarantee of equality not dependent on the plaintiff's showing membership in a protected group.

(a) The section 15 list is not exhaustive

The inclusion of certain prohibited grounds suggests that discrimination occurs when treatment or the effect of a law or practice is based not on an individual's actual merits, but on an individual's perceived or actual membership in a particular group. This contrasts with the various other freedoms and rights (as in sections 2, 3, 6(1), and 7-14) which do not require proof of discrimination. To show I have been denied freedom of expression, I do not have to show that it has been denied to me because I belong to a specific class. By contrast, if I want to show that I have not received the equal protection of the law, the wording of section 15 suggests that I may have to show that my perceived or actual membership in a protected class is the reason I was denied that right. The view that a showing of discrimination is not required is set out at pp.228-238. It may be that plaintiffs can make their case on the basis of discrimination or on the less restrictive basis that they have been denied equality.

Even if section 15 requires a showing of discrimination, the list of grounds is apparently not meant to exhaust the groups which may be protected from discrimination under section 15. Rather, it would seem that the list of classes in section 15 was intended to be open-ended. The Deputy Minister of Justice testified before the Joint Committee that "We are confident in the department that what the clause says here would entail...an...open-ended list of possible grounds for discrimination" (Joint Proceedings 41:18). However, a contrary view was perhaps implicit in his comment that "It would have to be open to [the courts] to decide whether there are additional grounds...." (emphasis added). Although the overall tenor of his remarks supports the open-ended approach, the wording could have been clearer. For example, Article 2.1 of the International Covenant on Civil and Political Rights states that member states undertake to respect and ensure "the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Such wording makes it clear that the list is not exhaustive ("without distinction of any kind") but that the enumerated grounds are an illustration of others which might be protected ("such as race...other status").

However, the real issue seems to be not whether non-enumerated grounds should be given protection, but rather which additional grounds will be judicially recognized. This issue is discussed in the following sections.

(b) Principles guiding judicial recognition of non-enumerated grounds

This section presents some possible guidelines which the courts might follow in determining whether to add a group to the list under section 15. The analysis is premised on the assumption that while the enumerated classes do not exhaust section 15's protection, not all conceivable forms of discrimination will result in standing to challenge government action under section 15. This appears to have been the intent of the government. After explaining that section 15 was intended to be open-ended, the Deputy Minister of Justice went on to intimate that not all other possible grounds would be protected by saying that the courts "would have to accept that there are some grounds on the basis of which discrimination is not acceptable" (Joint Proceedings, 41:18 (emphasis added)).

(i) The Guidelines

The guidelines tentatively suggested below are the following: (1) the group has received statutory protection from discrimination; (2) the group has been subject to a pattern of discrimination; (3) the major characteristic defining the group is not easily changed by the individual; (4) the group is a discrete and cohesive class; (5) it is not economically based.

These guidelines were developed from a consideration of the characteristics underlying the grounds already included in section 15. It is hypothesized that the kinds of classes which have the greatest chance of obtaining inclusion in the Charter are those which in some measure conform to the characteristics of the enumerated classes. This approach should probably not be followed strictly. It is based to some extent on traditional statutory interpretation, that is, the canon of construction that a word is limited by that which follows it -- the term discrimination in section 15 may be shaped by the examples following the term. However, interpretation of a constitution does not depend on such traditional rules and therefore, we should not assume that the phrase "in particular" is intended to limit the broader term "discrimination" in any way, including the nature of the grounds protected.

Again, it should be noted that if section 15 is considered to be broader than a strict anti-discrimination clause, the principles guiding the determination of added protected grounds may also be more flexible than those set out for illustrative purposes here. In international law, an open-ended anti-discrimination provision has resulted in many grounds of distinction being recognized:

> Determining whether a given distinction violates the non-discrimination principle will never concern whether the given distinction is covered by the non-discrimination provision or not. Every distinction, of any kind, will invoke the non-discrimination or equality principle (Bayefsky, 3).

Whatever principles may be developed by the courts may not be clearly articulated by them when deciding whether a member of a particular group should be given standing to bring a section 15 claim. The courts may be more likely to state reasons why a group is not recognized, rather than to set out a set of principles against which to assess groups. Nonetheless, this paper sets out possible principles for the purpose of indicating the kinds of groups which may be included to assist in the assessment of the arguments which may be made in any particular case.

In the paragraphs immediately following, there is a discussion of the analysis by which each proposed guideline was extrapolated from the grounds protected by section 15. Thereafter the paper will illustrate the use of these guidelines by assessing some possible new grounds in light of them.

(1) Protection in Human Rights Statutes

The enumerated categories are those which have already received protection in various Canadian human rights statutes. Race was the subject of the first anti-discrimination legislation. Religion is also a "traditionally" recognized ground. Age was first recognized as a prohibited ground of discrimination over twenty years ago when it was first added to the British Columbia human rights legislation in 1964 (Tarnopolsky, Discrimination, 224). Sex was added to the B.C. Act in 1969 (Tarnopolsky, Discrimination, 225).

Among the enumerated categories, disability has been the last to be included in the protection offered by human rights statutes. Physical disability was first recognized as a protected ground in interpretation of the B.C. legislation in 1976 (Tarnopolsky, Discrimination, 304) and has generally until recently been limited to physical disability. Disability was included in the Charter only in the fourth version after many groups had testified it should be included in the list. The major reason given by Jean Chrétien for not initially responding to these requests to include disability was the difficulty in defining it (Joint Proceedings, 36:14).

(2) Pattern of Adversity

The groups protected in section 15 appear to reflect the general policy underlying non-discrimination provisions. This policy was reflected in decisions under the British Columbia Human Rights Code which used to contain the concept of "no discrimination without a reasonable cause". Certain grounds were stated never to constitute a reasonable cause but these were not considered to be exhaustive and other classes have received the protection of the legislation. In adding pregnancy to the classes, a Board of Inquiry articulated the policy underlying human rights legislation:

> Pregnancy is one of those conditions where there has been a pattern of conduct by which employers made broad categorizations without regard to individual circumstances ... That situation presented a classic case of what human rights legislation is all about. (Gibbs v. Bowman (1978), quoted by Tarnopolsky, Discrimination, 138).

The major point here is that there has been a pattern of conduct which offends human rights legislation. This means that a history of decision-making based on general perceptions has occurred in relation to this particular characteristic. That history is relevant if it has had adverse consequences for persons who have been defined by that characteristic.

(3) Immutability

With the possible exception of religion, the grounds protected by section 15 are characteristics which one cannot change. While age is not strictly immutable in that we all grow older, it nevertheless is beyond our abilities to change our ages at will. One might argue that religion represents a voluntary assumption of beliefs; yet in another way, religious beliefs, by their nature, are an integral part of one's identity and cannot be easily changed or renounced. Human rights legislation has extended the protected grounds, again usually, but not always, to other "not easily changed" or "near-immutable" characteristics. Some have added ancestry (some use place of origin). Most statutes now include marital status, first recognized as a ground in 1971 in the Alberta legislation (Tarnopolsky, Discrimination, 294), although this is more voluntary than most of the other categories and is an "artificial" status, since it exists only through legal fiat. A few grounds appear only in a single province's legislation (citizenship in Ontario's and sexual orientation in Quebec's, for example).

(4) Discrete Group

The grounds which are protected by section 15 constitute discrete, recognized classes. Specifically referring to the importance of the American Supreme Court's recognizing gender discrimination as worthy of prohibition, Tribe says:

> It is at least as clear in the case of sex as it is in the case of race "that one's sexual identity is a centrally important, crucially relevant category within our culture" (Tribe, 1073).

This comment was made in the context of determining levels of scrutiny. It is not, it is submitted, relevant in that respect in the Canadian context. It is relevant to the suggestion that one factor to be considered in regard to determining possible added groups is the extent to which the group characteristic represents a major source of identity or serves as a discrete way of identifying people.

(5) Non-economic Basis

Another characteristic of the enumerated categories is that they are not in themselves economic categories, although they may be associated with such categories (for example, elderly women disproportionately live at below poverty level and a high proportion of disabled people are unemployed). Certain human rights statutes include economically-based categories within their protection. In Manitoba, source of income is included; in Ontario, receipt of public assistance in regard to accomodation rights; in Quebec, social condition and in Newfoundland, social origin are protected categories. However, as explained earlier in the paper, one view of the Charter is that it is not, in the main, an economic document. While certain rights and freedoms may be asserted in furtherance of economic goals, their main purpose is not to advance individual economic rights.

A brief consideration of how economic classes do fit into this scheme is in order. It has already been argued that the Charter is not intended to be an economic document; by this it is meant that the Charter is not intended to be a vehicle for the direct redistribution of goods and resources. This does not preclude the use of the rights and freedoms for purposes which have incidental economic ramifications. But, in the context of this analysis, groups which are disadvantaged on the basis of economic status cannot assume they have constitutional protection.

It follows from the above discussion that not all distinctions in legislation will be constitutionally recognized "classes" or categories. Only those which have the kind of characteristics raised above are likely to be recognized.

(ii) General Examples of the Guidelines Applied

Governments necessarily draw distinctions in order to carry out policy; in many instances, such distinctions will not be against historically disadvantaged groups but will merely be an unavoidable consequence of the legislation. For example, a law which imposes specified penalties on drivers convicted of impaired driving related to number of times convicted, discriminates between drivers who have been convicted once or twice and drivers who have been convicted three times. This is very different from a law which imposed different penalties on impaired drivers on the basis of age (on the ground that older drivers should be more responsible) or on the basis of marital or family status (on the ground married persons with children have greater responsibilities and are therefore committing a greater "crime" when they drink and drive). The same comments would apply to legislation which imposed stricter penalties on younger, single drivers on the basis that, having fewer responsibilities than older, married drivers, they were more reckless and more likely to drive while impaired.

There is a difference between the legislation discriminating on the basis of number of convictions and the legislation discriminating on the basis of age or marital status. A plaintiff challenging the first type of law would not get standing to make the claim under section 15 because number of convictions would not be recognized as a constitutionally protected ground. In contrast, the other three laws would be held to be a contravention of section 15, subject to a successful section 1 defence.

Another illustration of the kind of group which would not satisfy the above criteria for inclusion is the following. Assume legislation required recently qualified and future teachers, but not experienced teachers, to comply with certain requirements enacted in order to improve teachers' performance in the classrooms. Although there would be classification on the basis of experience, it would not be discrimination which comes within the purview of section 15. The categories of new and experienced teachers would not comprise the kind of discrete groups which constitute a recognized source of identification the way women/men, disabled/non-disabled and black/white do.

This analysis has assumed that the courts will determine whether a particular form of discrimination is one encompassed by section 15 at the intial stages of the inquiry. In other words, the courts would in effect dismiss the challenge because the applicant did not have standing under subsection 24(1) because she did not show discrimination on a protected ground. Although the legislation classified on the basis of convictions or teaching experience, the Court would find that the third time convicted impaired driver or the new teacher did not have her equality rights infringed because that particular category is not constitutionally protected.

(c) The Process of Applying the Principles Guiding Judicial Recognition of Non-Enumerated Groups

The process of recognizing unenumerated groups will likely be an evolutionary one. Although the first case brought by an individual on a non-enumerated ground might not result in recognition of that ground as protected by section 15, other individuals would be free to bring future cases on the same ground. At some point the court may agree to hear the case; in that instance, even if it finds the particular instance of infringement to be a reasonable limit, it will have granted judicial recognition to that class or ground as protected by section 15. After several cases, it could become merely a matter of form for the plaintiff to have to show that the ground is one covered by section 15. Alternatively, the Supreme Court may explicitly state that this ground is one equal in status with the enumerated grounds and thereafter a plaintiff with that characteristic will automatically have standing to make a _prima facie_ case of infringment. It is likely that some grounds, however, will never be recognized. One of the advantages to plaintiffs' claiming discrimination on an enumerated ground is that they do not have to go through this process but always have standing to make a _prima facie_ case.

As noted above, the courts may not articulate a set of principles similar to those suggested here. Nevertheless, it may be possible to discover patterns in decisions which reveal principles, similar to those set out above and/or others, as well as a method of applying them.

If the courts apply the criteria set out above and/or other criteria strictly, the criteria (whatever they in fact are) are likely to result in the exclusion of certain kinds of groups, regardless of the severity or kind of the inequality involved. Strict observance of the principles has the advantage of some degree of predicability. It may also help to maintain the internal consistency of section 15, in the sense that it will be read to prohibit only certain kinds of discrimination. However, one of the disadvantages of this approach is that there may be individuals who suffer inequality who are not granted standing because the particular reason or ground for the unequal treatment or effect is not one recognized under section 15.

As well, although the Charter is not primarily an economic document, there may be instances in which persons who are poor are clearly treated unjustly. For example, legislation which stated that persons with income below the poverty level as determined by Statistics Canada could not attend university or live in certain housing projects would constitute direct discrimination against the poor. Under the strict observance approach, unless persons denied access to universities, hospitals or the housing project are able to show they are poor because they are in fact black or female or disabled, and therefore can show disproportionate impact on a protected ground, there may be no way to remedy the injustice under the Charter.

The strict application of criteria might be inconsistent with a broad, liberal and purposive interpretation of the Charter. It is possible to apply the principles in a manner allowing courts to respond to cases of severe injustice which would not be entertained by a court under a strict application of the principles to be dealt with under section 15. Although the courts may still apply the principles set out above, the principles alone would not be determinative of whether the court would hear the case (unless, presumably, the "plaintiff" could not show the ground involved met any of the criteria). In addition to these principles, the severity of the infringement would be a relevant factor.

Under this approach, in each case the courts would consider whether the ground and the infringement involved together constituted an interest deserving of constitutional protection. In some cases, the hurdle of showing a ground deserving of recognition would be easily crossed and in a short period of time, the requirement would become a formality. The courts would also still have the option of explicitly adding a ground to the enumerated list. For the grounds which would quickly receive judicial recognition, this process would be but a minor inconvenience since the courts will still recognize them under this approach. But for groups which had little hope of success in "getting in" section 15(1) under the strict observance method the approach would be of great value. The courts would not be reluctant to grant remedies to such groups for fear they would be a permanent addition to the enumerated list having been recognized even once.

Marital status illustrates the advantage of this approach. Recognition of marital status on the same terms as race, or sex, could have far-reaching ramifications on the legal system in the area of family law and other areas which are expressly established on an assumption that marriage changes the obligations owed by one person to another. On the other hand, there are instances when discrimination on the basis of marital status might have serious implications for the individual who is the victim of the discrimination, where it obviously has no relation to the benefit or requirement. Although it could be argued that this is a question for section 1 and not section 15, the courts might be more comfortable with an approach which does not require all cases of discrimination on the basis of marital status to be determined under section 1 or no such cases to be heard at all because marital status was not a protected ground.

To some extent, the separation between sections 1 and 15 may be blurred with a flexible approach and some section 1 concerns would be considered under section 15. It would also be harder to predict the circumstances under which one could get standing. However, this difficulty would probably diminish over time. Balanced against these disadvantages is the likelihood the the courts will recognize economically-based groups on this approach, when there are very serious infingements of rights.

Finally, some consideration should be given to the implications of the courts' not developing a relatively clear-cut set of principles to determine the "added" groups. A set of pre-determined principles may appear to contradict the broad guarantees offered by the Charter and to be too "literal" with respect to the spirit of section 15.

For example, the courts may be prepared to consider that the members of one occupation are excluded from benefits offered another occupation; that residents in isolated areas may have less access to services; that the date of implementation of a rule or change of rule affects those subject to it differently than persons who are not; that legislation directed towards a particular group may be more onerous than similar legislation directed towards another group in similar circumstances. All these examples still refer to plaintiffs who can claim connection with other like persons but they do not seem to be characterized in ways generally acknowledged in human rights legislation. Yet recognition of them and others like them would constitute a middle ground between a strict anti-discrimination interpretation and a wide-open equality view of section 15.

(d) The standard to be applied to non-enumerated groups under section 1

There are three ways in which the courts could treat new grounds. They could apply a lower standard of review than to enumerated grounds, the same standard of review as to enumerated grounds or a varying standard of review, depending on the particular ground*.

(i) A lower standard

It is possible that the courts will treat the phrase "in particular" as showing an intention by the drafters of the Charter to apply a higher standard to the enumerated grounds than to the non-enumerated. The Deputy Minister of Justice did testify before the Joint Committee that the phrase "in particular" emphasizes that some grounds of discrimination are "more invidious" than others (Joint Proceedings, 41:18). They could also come to the same conclusion simply on the basis that enumerated grounds are deserving of greater protection because their inclusion reflects greater political or societal consensus.

(ii) The same standard

The courts could decide to apply the same standard to all grounds, seeing no justification to treat them differently. In Gay Alliance Toward Equality v. Vancouver Sun, Mr. Justice Dickson, in *dictum*, suggested that the failure to include sexual orientation in the list of grounds which could never constitute reasonable cause for discrimination under the B.C. Code "may indicate a lesser degree of protection in the weighing of reasonable cause". However, he emphasized "that there is no necessary limitation upon 'reasonable cause' to be read into the statute by the mere absence of reference to sexual orientation". A case under human rights legislation has no precedental value for Charter interpretation, of course. However, it does suggest judicial thinking with respect to this issue.

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* The term "standard of review" may be misleading in the sense that it derives to some extent from the American "levels of scrutiny" approach which it is not necessary to apply under the Charter and which has not apparently attracted the Supreme Court of Canada if the comments on section 1 by the Dickson J. (as he then was) in Big M Drug Mart are any indication (see above, p.135).

(iii) Varying standards

Alternatively, the courts may apply a strict test to certain non-enumerated grounds which closely resemble the listed grounds and a lower standard to other non-enumerated grounds. This assumes that similarity with the enumerated grounds is not one of the criteria applied by the courts in determining whether a member of non-enumerated groups should be granted standing to pursue a section 15 claim. The courts may then find greater justification in applying a lower standard to dissimilar grounds. However, even if similarity with the enumerated grounds is a criterion, the courts may apply different standards if they apply different standards to different enumerated grounds. In that case, a recognized non-enumerated ground may be subject to the same test as a similar enumerated ground. For example, marital status may be found to be less like race or sex than like age or disability and therefore subject to a test similar to age or disability. This would be because martial status is not immutable in the way race or sex is; furthermore, it is more likely that marital status is more logically related to certain benefits to a greater extent than race or sex would be. (For the discussion of reasons to treat grounds differently, see above, pp.307-310.)

In the United States, when the court determines the level of scrutiny to be applied to an infringement under the equal protection clause, it considers both the group involved and the nature of the interest involved. The equal protection clause does not list any prohibited grounds of discrimination and, as discussed above, only a very few grounds, specifically race and religion, are given strict scrutiny. However, when contravention of equal protection on other grounds is brought before the court, it must decide whether or not to afford strict scrutiny to the contravention. The court discussed the criteria to be examined in making this determination in Plyler v. Doe, 102 S. Ct. 2382 (1982). The case concerned a challenge to a Texas statute which withheld from local school districts any state funds for education of children who are not legally admitted into the United States.

The court, four members dissenting, held that the statute contravened the equal protection clause. Justices Brennan, Blackmun and Powell held that aliens are not a suspect category and that education is not a fundamental right*.

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* Justice Marshall, joining with the majority, nevertheless disagreed in holding that education was a fundamental right. He argued that the nature of this case showed "the wisdom of rejecting a rigidified approach to equal protection analysis, and of employing an approach that allows for varying levels of scrutiny depending upon 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn'".

Nevertheless, they believed that the importance of education and the ramifications of denying education to a class of children warranted more than the rational basis test as it is usually defined (a rational relationship with a legitimate state purpose). They held that the classification could not be held to be rational unless it furthered some substantial goal.

Justice Brennan in stating the opinion for the court said:

> Several formulations might explain our treatment of certain classifications as "suspect". Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. Finally, certain groups, indeed largely the same groups, have historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." [Carolene Products]. The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups...Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish. (Footnotes omitted)

(e) Examples of non-enumerated grounds which the courts may recognize

There are a number of grounds or bases upon which people may suffer discrimination which were not included in the enumerated list. The courts have the discretion to extend the protection of section 15 to members of groups not listed. A few such grounds are considered below. The major non-enumerated grounds with potential for inclusion are political belief and marital status, both of which had advocates before the Joint Committee (Joint Proceedings, 5:8, 9:59, 19:30, 22:58, 48:21). These are discussed in some detail below, followed by a briefer discussion of other grounds. Each ground is assessed in light of the principles discussed above, namely:

(1) The group has received statutory protection from discrimination;

(2) The group has been subject to a pattern of discrimination;

(3) The major characteristic defining the group is not easily changed by the individual;

(4) The group is a discrete, self-defined and cohesive class;

(5) The group is not economically based.

(i) Political Belief

(1) Human rights protection

The Quebec Charter includes political belief as a protected ground. Jacques Bergeron states in his article about new categories included under the Quebec Charter of Human

Rights and Freedoms that for the Commission des droits de la personne du Québec, any distinction, exclusion or preference based on the following would be prohibited:

> The adherence to or the identification with any ideology independently of any membership in a political organization;
>
> Membership in any organization whose aim is exclusively the conquest of power, like a political party;
>
> Membership in any organization not exclusively dedicated to the conquest of power, such as pressure groups, in which cases distinction, exclusion or preference will also have to take into account any ideology carried by the organization to which the individual is identified or to which he gave his formal adhesion (Bergeron).

There have been few reported cases in regard to political belief. In La Commission des Droits de la Personne du Quebec c. Cité de LaSalle (1981), 3 C.H.R.R. D/659, a group had been excluded from an information fair because it had circulated a petition at a previous fair. There were to have been no political activities at the fair. The Quebec Provincial Court found that there had been discrimination on the basis of political conviction.

In La Commission des Droits de la Personne du Quebec c. Le College d'Enseignement General et Professional St.-Jean-Sur-Richelieu (1980), 1 C.H.R.R. D/85 the complainant, a Marxist-Leninist, did not have her contract at a teacher's college renewed. The Quebec Superior Court found that she was "too narrow and intransigeant [sic] in her approach, favouring Maxist-Leninist ideology", dismissing the complaint. Of interest is the judge's ruling that the onus was on the Commission to show that the College did not renew the complainant's contract because of her political beliefs, not on the College to show that there was another reason for not renewing the contract or that it was justified in not renewing it on the basis of political belief. The onus would be (on the College) under the Charter.

(2) Pattern of adversity

Persons with political beliefs which are significantly inconsistent with accepted beliefs in an organization or society have been occasionally denied opportunities because of their beliefs. For example, professors in universities have been denied tenure or reappointment because of political beliefs. In British Columbia, the Law Society in 1950 denied admission to a potential member solely on the basis of his political beliefs (Martin v. Law Society of British Columbia, [1950] 3 D.L.R. 173 (B.C.C.A.)).

(3) Immutability

Political belief is not immutable, as is race, but it is often an integral aspect of an individual's self-definition. In this sense, it is similar to religion. Religion is also not immutable in the sense that race is; however, we do not expect people to have to change their religion in order to obtain benefits which have nothing to do with religion. Freedom of religious belief is recognized as an important element in democratic society. Similarly, the right to hold and express political beliefs or a political "creed" is fundamental to a democracy. While it is correct that freedom of expression to some extent, and perhaps to a great extent, would include many situations in which equal benefit or protection of the law had been denied because of political belief, this is also true of religion; yet religion is recognized explicitly under section 15.

(4) Discrete group

In order to illustrate the difficulty of including "political belief", Jean Chrétien suggested that "Ku Klux Klan ideas" might be political beliefs (Joint Proceedings, 48:23). It should be noted that there could be restrictions permitted under section 1 for political beliefs which espouse hatred for certain religious groups, for example. Such groups would be initially protected under section 15, but would likely be subject to some limitation under section 1. The desire not to protect undesirable groups does not justify failing to protect all victims of discrimination on the basis of political belief. A member of the Committee raised the issue of government appointments and the possibility of "los[ing] under law the power ... to decide that someone who was predisposed to the Russian perspective, for instance, might be excluded". It was pointed out that section 1 would be available. Another objection related to substitutions of senior civil servants on changes in government (Joint Proceedings, 48:23-26).

(5) Non-economic basis

Political beliefs may encompass views about the economic system. However, they are not specifically based on economic criteria. Political belief therefore satisfies this criterion.

It appears that the major reason for not including political belief was that it is difficult to define. The government accepted that religion also has definitional difficulties. However,

> [religion] is one that has been in bills of rights such as the United States Constitution and the Diefenbaker Bill of Rights for over 20 years now, and the sensing through the courts as to what constitutes a firmly held and recognized and acceptable religious belief is a little easier to handle than political belief. I am not saying that there is any definitive definition of a religious belief because that would be to mislead you. So there are problems there, too (Joint Proceedings, 48:30).

(ii) Marital Status

(1) Human rights protection

Although marital status is a protected ground under several human rights statutes, there seem to be few reported cases involving discrimination on the basis of marital status. Of those which have been decided, some apply a straightforward meaning of marital status while others consider different interpretations.

In Bosi v. Township of Michipicoten (1983), 4 C.H.R.R. D/1252, Cindy Bosi was rejected for a position with the Township handling accounts because her husband was employed with the Township police force. The Board held that Bosi was rejected not because of her marital status but because she was married to a specific person. Even if the board had found discrimination on the basis of marital status, the avoidance of a conflict of interest constituted a *bona fide* occupational qualification and requirement, in the opinion of the Board, since Bosi would have been handling her husband's expense accounts.

In Blatt v. Catholic Children's Aid Society (1980), 1 C.H.R.R. D/72, decided under the predecessor to the current Ontario Code, which did not include a definition of "marital status", a Board found that the dismissal of a Catholic Children's Aid Society worker following the revelation that he lived in a common-law relationship was not discrimination on the basis of marital status, as the complainant had claimed, but a moral judgment on "lifestyle"; such a moral judgment was not proscribed by the Code.

A limited meaning was also given to "marital status" in St. Paul's Roman Catholic Separate School District No. 20 vs. Canadian Union of Public Employees, Local 2268 (1982), 13 C.H.R.R. D/915 (Sask. Q.B.), involving the termination of the complainant's employment because she lived in a common-law relationship. The arbitrator had found the termination to be a violation of the collective agreement which protected employees against discrimination on the basis of marital status. The Court of Queen's Bench overturned this ruling on the basis that the complainant had no marital status because she had not gone through a ceremony recognized by law. The Court held that the Saskatchewan Human Rights Code, which defines marital status to include a common-law relationship, did not apply because the Respondent School District was not an employer for the purpose of the Code.

This case indicates the desirability of treating marital status in a way one would likely treat religion: that is, the right not to be discriminated against on the basis of religion or marital status includes the right not to be discriminated against if one does not profess a religion (or is an atheist) or if one does not have a marital status. More simply, marital status can be defined to include common law relationships, being single, widowed and divorced or separated.

In Bain v. Air Canada (1980), 2 C.H.R.R. D/403, the Tribunal dealt briefly with the issue of common-law relationships. Bain had been refused a ticket at the special family fare price offered by Air Canada. She was travelling with another single adult and therefore was not eligible for the family fare which was available to common-law and legal spouses, parents and children travelling together. The Tribunal's decision that the family fare discriminated on the basis of marital status was set aside by the Federal Court of Appeal in Air Canada v. Bain (1982), 3 C.H.R.R. D/682 on the ground that Bain could not take advantage of the family fare because she was not related to her travelling companion, not because she was single. If she had been married but travelling with a friend, she would still not have been entitled to the family fare. There is no discrimination if the "same benefit is equally denied in identical circumstances to married persons".

Under the Quebec Charter, marital status is a form of "civil status" (this indicates that it is a legal status). Thus an employer's policy of dismissing single employees before married employees was held to be discrimination on the basis of civil status (La Commission des Droits de la Personne du Quebec c. Ecole Conduite St-Amour Inc. (1983), 4 C.H.R.R. D/1451 (Que. Prov. Ct.)). Similarly, refusal to rent accommodation to a divorced person living alone is discrimination on the basis of civil status (Aronoff vs. Hawryluk (1981), 2 C.H.R.R. D/534 (Que. Prov. Ct.)).

(2) Pattern of adversity

Persons who are single are often treated differently from persons who are married, and persons who are in common-law relationships may be treated differently than are legally married people. In some cases, the different treatment may not be relevant to the marital status.

The connection between gender and marital status is illustrated by Vanderspeck v. Poole (1983), 5 C.H.R.R. D/1888 (B.C.). Poole refused to rent a townhouse to Vanderspeck and a female friend with a child because the landlord believed that single women cannot do repairs. The perception is not of course that married women can do repairs but that married women come with men who supposedly can do repairs. There also seemed to be some question of whether Poole believed a single person would not be reliable about paying rent. The Board found discrimination on the basis of both sex and marital status.

(3) Immutability

Marital status is not immutable. For some people it is very easily changed. For most people, their marital status is voluntary. However, some persons live in common-law relationships because one partner is unable to obtain a divorce from a legal spouse. Marital status differs from race, sex, age and similar characterisitcs because it exists only as a legally established state.

(4) Discrete group

It is clearly possible to distinguish single from legally married people. These constitute two distinct groups. It is more difficult to identify persons in common-law relationships, but it is not impossible to do so on the basis of a criterion such as self-designation as a common-law spouse or length of cohabitation.

(5) Non-economic basis

Marital status is not an economically based classification.

(iii) Economic Status

(1) Human rights protection

There has been some recognition of economic status in human rights legislation, such as social origin in Newfoundland, receipt of public assistance in relation to accommodation in Ontario, source of income applied to some prohibitions under the Manitoba legislation, and social condition under the Quebec Charter of Human Rights and Freedoms.

(2) Pattern of adversity

The poor have been subject to discrimination in the sense that assumptions are made about their ability to work, to engage in normal activities, to raise their children and so forth.

(3) Immutability

Being poor is often outside an individual's control. There can be a cycle of poverty resulting from the inability of one generation to provide adequate nourishment and intellectual stimulation to the next generation.

(4) Discrete group

The poor may be a discrete group.

(5) Non-economic basis

Economic status is obviously an economic classification.

(iv) Social Condition

(1) Human rights protection

Social condition is protected by the Quebec Charter. Bergeron explains that "social condition" includes "all factors showing the exact relation of strength or weakness of an individual in relation to his status (condition) in relation to society (social)". This includes "the place occupied by an individual in a society due to his birth, revenue, education, and trade", but may be broader than that and may include "the judgment any society has on any individual and which depends on the mutual relations that are established". The proposed Manitoba legislation would include "social status" as a protected ground. The Newfoundland legislation includes "social condition". The International Convenant on Civil and Political Rights and the Universal Declaration of Human Rights prohibit discrimination on the grounds of "social origin".

A refusal of accommodation when the applicant was unemployed has been found not to be prohibited by the Quebec Charter in La Commission des Droits de la Personne du Quebec vs Boily (1982), 3 C.H.R.R. D/852 (Que. Prov. Ct.). Nor is criminal record included in "social condition" (La Commission des Droits de la Personne du Quebec vs. La Ville de Beauport (1981), 3 C.H.R.R. D/648 (Que. Prov. Ct.)). Being a member of the working class is apparently a "social condition" but refusal to rent to social assistance recipients is not discrimination on the basis of social condition (it is said to be normal because the landlord wants a tenant who can pay the rent) (La Commission des Droits de la Personne du Quebec vs. Paques (1981), 2 C.H.R.R. D/444). By contrast, a refusal to rent to someone in receipt of public assistance would constitute prohibited discrimination under the Ontario Code, which does not expressly prohibit discrimination on the ground of social condition except in this respect.

(2) Pattern of adversity

Insofar as social condition is similar to economic status, the same comments would apply to both in relation to the existence of a pattern of discrimination.

(3) Immutability

Again, as with economic status, social condition would be very difficult to change, although it is not immutable in the way race is.

(4) Discrete group

Since social condition as it has been defined under the Quebec Charter comprises several different kinds of conditions, it is hard to see it as a discrete category. When defined economically, it simply becomes economic status and is discrete in that respect. People may define themselves in relation to social condition and may therefore be a self-defined group but the same difficulties arise in relation to the broad nature of its definition.

(5) Non-economic basis

Social condition is not strictly economically based but it does include economically based categories and seems to be primarily defined in that sense.

A prohibition against discrimination on the basis of social condition or social status would introduce economic grounds into section 15, although not all forms of social condition need be economic. A flexible approach to the recognition of non-enumerated grounds could permit the courts to redress injustices resulting from a person's economic condition without being compelled at the same time to recognize social condition in instances dealing with the redistribution of economic resources which, one view in the paper asserts, is not a feature of the Charter's general principles.

(v) Family Status

(1) Human rights protection

Family status is protected under several human rights statutes, including Manitoba and Ontario. In Monk v. C.D.E. Holdings Ltd. (1983), 4 C.H.R.R. D/1381 (Man.), "family status" was defined as including the status of an unmarried person or parent, widow or widower or that of a person who is divorced or separated or the status of the children, dependants or members of a person's family. In that case, Monk had been a cashier at I.G.A. Her husband had been a shareholder in the I.G.A. and, along with other shareholders had sold his shares to D.H. When D.H. did not pay for the shares, the ex-shareholders, including Monk's husband, sued him and D.H. fired Monk. The Board found that this was discrimination on the basis of family status for which there was no reasonable basis (on the ground of conflict of interest, for example).

A refusal to hire a member of the family of an employee may be justified as, for example, when a municipality wishes to avoid the appearance of influence or nepotism (Ville de Brossard c. La Commission des Droits de la Personne du Quebec et Line (1983), 4 C.H.R.R. D/1752 (Que. C.A.)). Laurin had been refused employment because her mother already worked for the town.

(2) Pattern of adversity

This ground may be of importance in protecting women with children from exclusion from employment on that basis. Other examples of discrimination on the basis of family status might involve denial of accommodation because there are children in the family. Thus one can say there has been some discrimination on this basis.

(3) Immutability

Although this is not a characteristic similar to race, it would be difficult to change one's family status without ending a marital relationship or divesting one's self of one's children. Therefore we can say that it is not easily changed, at least at certain times of one's life.

(4) Discrete group

It is easy to determine whether or not there are children in a family; people do define themselves in relation to their family status.

(5) Non-economic basis

This is not an economically based category.

(f) Conclusion

The discussion of grounds which might be judicially added to those listed under section 15, while not exhaustive, gives an indication of the kinds of grounds which we might expect the courts to be asked to protect, especially if anti-discrimination traditions are imported into section 15. The same kind of analysis can be applied to any ground upon which an individual might attempt to establish a section 15 claim.

SUMMARY OF PAGES 350-375

7. Section 15(2): Affirmative Action as a Defence and as a Remedy

Discussion of the meaning of the term "affirmative action". Discussion of affirmative action in the American context, under the Saskatchewan Human Rights Code, and under the Canadian Human Rights Act to show the standards which might be applied by the courts in assessing a section 15(2) program.

Discussion of section 15(2) as a defence and whether or not it is subject to section 1, with the conclusion that it probably is not.

Discussion of section 15(2) as a remedy for an infringement of section 15(1).

7. Section 15(2): Affirmative Action as a Defence and as a Remedy

Section 15(2) states that the guarantee of equality and the prohibition of discrimination in section 15(1) does not mean that special programs to help disadvantaged individuals and groups are prohibited:

> s.15(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The removal of affirmative action or special programs from the prohibition under section 15(1) may mean that the scope of the Charter is not intended to encompass such programs. That is, affirmative action may be exempted from the operation of the Charter. In general, the Charter circumscribes the scope of government action in relation to the rights and freedoms guaranteed by it. It can be argued that the effect of section 15(2) (and section 6(4)) is that the Charter does not circumscribe the legislature's ability to carry out programs or pass laws which it defines as affirmative action. It is possible that if such activity is exempt from the effect of the Charter, it is also exempt from the imposition of judicially-determined standards which are discussed in this section of the paper.

However, section 15(2) may mean that while such programs may have to meet judicially-imposed standards, their status as special programs will not alone serve to invalidate them as contravening the guarantee of equality under section

15(1).

(a) Background

"Affirmative action" is not a new concept in Canada. As Tarnopolsky points out, "for at least the last decade we have witnessed in Canada the greatest affirmative action programme of all, and this is the recruitment of Francophone Canadians into the federal public service" (Tarnopolsky, Discrimination, 152, emphasis in original). In addition, special provision is made for language rights and religious educational rights in the British North America Act, continued in the Constitution Act, 1982. However, these have not been imposed by a court, although the provisions have been interpreted and upheld by the courts.

In the United States, the Supreme Court has long recognized the necessity of "colour consciousness" to remedy purposeful discrimination. Thus in Green v. County School Board of New Kent County, Virginia, 88 S. Ct. 1689 (1968) and other school desegregation cases, the Court emphasized that the race of students must be considered in determining whether a constitutional violation had occurred and that race must be considered in formulating a remedy. Where a judicial finding of de jure segregation had been made, the Court recognized that colour conscious affirmative action, in the form of busing, was necessary to remedy the situation. The question of the structural injunction used in these cases is discussed below, pp.422-423. In the Green case, Brennan J., for the court made it clear that its order to the Board "to formulate a new plan and, in light of other causes which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'negro' school, but just schools" was necessary in order to make its decisions in the Brown cases effective.

In the United States, affirmative action also arose in relation to contract compliance. Under contract compliance, government contracts and sub-contracts were required to contain anti-discrimination clauses, beginning in 1941. In 1961, contract compliance required that a contractor would take affirmative action, not merely not discriminate. Contract compliance as a means for implementing affimative action has not yet been developed in Canada, but it may become more important in light of section 15(2) of the Charter which publicizes affirmative action*. The federal government's affirmative action ("employment equity") proposals arising out of the Abella Report involve contract compliance measures.

(b) The Meaning of Affirmative Action

A straightforward, simple definition of affirmative action is that it is a special arrangement adopted in order to remedy past discrimination suffered by members of a minority group and to enable them to improve their position in employment, education or other areas of life. Although section 15(2) defines affirmative action as "any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups", it is not very specific. A brief look at other definitions, some more complex, employed by the courts, in legislation and in policy contexts may help to clarify what is involved in an affirmative action program. Underlying these definitions is the assumption that a history of inequality cannot always be transcended by equal treatment in the present. Sometimes special treatment is necessary to redress the imbalance between the members of a minority and majority groups.

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* For discussion see Tarnopolsky, Discrimination, 122 ff. See also section 25 of the Ontario Human Rights Code, 1981.

In Re Athabasca Tribal Council and Amoco Canada Petroleum Co. Ltd. (1981), 124 D.L.R. (3d) 1 (S.C.C.), Mr. Justice Ritchie, dissenting in part, the Chief Justice, Dickson and McIntyre JJ. concurring, stated that the proposals put forward by the Tribal Council "have come to be collectively referred to as an 'affirmative action' program... It is clear that its main objective was to afford the Indians insofar as conditions would allow, an equal opportunity with other inhabitants to participate in the tar sands plant undertaking". It should be noted that the emphasis in this definition is on providing native peoples with an equal opportunity with non-natives, not with something more than is available to non-natives. The program proposed by the Council included an native employment office and native industrial coordinator, full-time native recruiters, training programs funded by the federal government in native communities and a native business opportunities program sponsored by Alsands.

In the Court of Appeal (1980), 112 D.L.R. (3d) 200 (Alta. C.A.) Laycraft J.A. and Morrow J.A. defined affirmative action more specifically. Laycraft J.A. defined affirmative action as

> terms and conditions imposed for the benefit of groups suffering from economic and social disadvantages, usually as a result of past discrimination, and designed to assist them to achieve equality with other segments of the population....

Morrow J.A., dissenting, defined affirmative action as

> a requirement to take positive or affirmative steps to overcome discriminatory practices -- to require the employer to overcome the result or effect of past discrimination, viz, lack of work experience or training in the disadvantaged racial group, by giving that group, or a certain number of that group, special apprenticeship opportunities or job preparation with the ultimate object of bringing such group to the point or position where its members are then able to compete on equal terms with the majority or more advantaged.*

Canadian human rights legislation commonly permits affirmative action programs. Under some legislation, such as the Canadian Human Rights Act and the Ontario Human Rights Code, it is specifically stated either that an affirmative action program is not a discriminatory practice or that it does not infringe the rights guaranteed by the legislation. Other legislation, such as that in Manitoba, simply state that the Commission may approve a special plan. In some cases the phrasing emphasizes the prevention of disadvantages (for example, the Canadian Human Rights Act) while in other cases it may refer to promoting the position of the disadvantaged class (such as in the Manitoba Human Rights Act which refers to plans "designed to promote the socio-economic welfare and equality and status of a disadvantaged class of persons" defined by the enumerated categories). The Ontario Code uses both kinds of language. Section 13(1) of the Code states:

> A right under Part I is not infringed by the implementation of a special programme designed to relieve hardship or economic

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* Other definitions in the Canadian context can be found in Tarnopolsky, Discrimination, 155.

> disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

The Canadian Human Rights Commission has set out the purpose of special programs in a manual on the criteria for compliance with special programs in employment. It indicates the philosophy of affirmative action from the point of view of the Commission, at least in the employment context:

> The purpose of a special program in employment, as intended by the Canadian Human Rights Act, is to provide the conditions which will nurture the growth of equal opportunity for minority group individuals, the physically handicapped, and women within the working environment.

(c) Whether Affirmative Action is Reverse Discrimination

One of the major issues relating to affirmative action is whether or not it constitutes reverse discrimination and is therefore impeachable on that ground. This has been the major source of contention in American caselaw. Section 15(2) appears to resolve this issue by making it clear that affirmative action does not infringe the guarantee of equality or the prohibition against discrimination. Section 15(2) does not appear to guarantee a _right_ to affirmative action but is merely intended to preclude a successful _Bakke_-type challenge in Canada. _Regents of the University of California_ v. _Bakke_, 98 S.Ct. 2733 (1978)* involved a challenge by a white applicant to the special program designed to increase the proportion of minority doctors implemented by the University of California School at Davis. Under the program, sixteen of the one hundred places available had been reserved for minority candidates. The minority candidates who had designated themselves as disadvantaged in their applications were rated on the same criteria as other candidates but did not have to meet the 2.5 grade point average cut-off applicable to non-minority or non-disadvantaged candidates. Bakke, a white male, had applied twice to Davis and on each occasion his scores were either close to or better than the average of the special candidates although slightly under the lowest acceptable score in the general program. He brought an action claiming he had been discriminated against on the grounds of race under the equal protection clause of the Fourteenth Amendment and under the Civil Rights Act of 1964.

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* An extensive discussion of _Bakke_ can be found in Tarnopolsky, _Discrimination_, pages 127 ff.

The Supreme Court of the United States split on the issue of whether affirmative action was permitted under provisions making discrimination illegal. Four Justices, basing their decision on the Civil Rights Act, found that the program at Davis violated the Civil Rights Act and ordered that Bakke be admitted to the school. Four other justices held that under the equal protection clause race could be used as a criterion when the purpose was to overcome substantial under-representation by a minority group. Mr. Justice Powell joined the first group of judges in the decision that Bakke should be admitted to Davis; he joined the second group of judges in holding that affirmative action programs based on race might be valid. However, he stated that remedies for discrimination must follow violations. Voluntary programs, such as that at Davis, could not be instituted since "preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake". He considered the Davis program was in contravention of the equal protection clause because it precluded consideration of persons other than those of minority races. His opposition was to quotas; accordingly, he referred with approval to programs at Harvard and Princeton in which race was given some weight in the enrollment decision but was considered along with a wide variety of other factors.

Thus Bakke left the constitutional validity of voluntarily instituted affirmative action in doubt in the United States. However, the Supreme Court of the United States again addressed voluntary affirmative action programs in United Steel Workers of America v. Weber, 99 S. Ct. 2721 (1979). The workforce at Kaiser Aluminum was marked by a far lower percentage of black persons in skilled positions than black workers in the local workforce. The union and Kaiser negotiated an affirmative action plan by which 50% of openings in in-plant training programs designed to teach under-skilled production workers the skills necessary to become craft workers were reserved for blacks. Weber, a white applicant, was rejected as a craft trainee at Kaiser even though he had more seniority than those of the highest qualified blacks accepted for the training program. He challenged the program as contravening the Civil Rights Act. The plan was upheld in a five-two decision; two judges did not participate in the decision. Justice Brennan for the majority stated that the program was consistent with the purpose of the statute and that the statute should not be interpreted literally to forbid all forms of race conscious affirmative action. Rehnquist J., dissenting, stated that a quota was destructive of the concept of equality and that "no action disadvantaging a person because of his colour is affirmative". The dissent viewed an affirmative action program as reverse discrimination and believed that this was determinative of whether a program could be established.

It should be noted that the Kaiser plan involved a private employer. Such a case could not be brought under the Charter, presumably. The Davis plan may or may not be subject to the Charter, depending upon whether universities are considered to be private institutions. Section 15(2) does answer the question of whether affirmative action is reverse discrimination, but it does so only in the context of government programs and not in the context of privately instituted programs. However, they would be subject to human rights legislation which, as indicated, generally permits affirmative action.

In Fullilove v. Klutznick, the Supreme Court of the United States considered a congressional program which provided that ten percent of federal funds granted for local public works projects were to be used by the grantee to procure services or supplies in businesses owned by specified minority group members. The requirement contained a provision which would prevent participation by minority firms who had not been excluded from participation in contracting opportunities. Six members of the court found that the program, which was designed to remedy the effects of past discrimination, was permissible under the equal protection clause of the Fourteenth Amendment. Two members of the court, dissenting, held that no race classifications were permissible under the equal protection clause. The third dissenting member of the court found that the particular plan contravened the Fourteenth Amendment because it was not adequately tailored to address the problem.

Burger C.J., joined by White and Powell JJ., stated for the Court that Congress has the jurisdiction to induce voluntary action to ensure compliance with anti-discrimination legislation and constitutional provisions but "where Congress has authority to declare certain conduct unlawful, it may, as here, authorize an induced state action to avoid such conduct". In assessing the program, the Court noted that its purpose was not to give minority groups a preference in the construction industry but to place them "on a more equitable footing". It also noted that although non-minority firms which had not themselves engaged in discrimination might be deprived of some contracts under these provisions, in order to remedy "the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible". Mr. Justice Powell in a separate opinion reiterated his view in Bakke that affirmative action could only follow a finding of violation, but in this instance he found that "Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors". In his concurring opinion, Justice Marshall stated that it is not possible to eliminate the effects of discrimination "without the acceptance of race-conscious remedies". He went on that in upholding the ten percent set-aside,

> the Court accords Congress the authority necessary to undertake the task of moving our society toward a state of meaningful equality of opportunity, not an abstract version of equality in which the effects of past discrimination would be forever frozen into our social fabric.

The debate about the status of affirmative action as reverse discrimination was referred to by Mr. Justice Ritchie in his opinion in Re Athabasca Tribal Council. Although Ritchie J. (Laskin C.J.C., Dickson and McIntyre JJ., concurring) agreed with the majority judgment delivered by Mr. Justice Lamer that the plan proposed by the Tribal Council would be ultra vires the Energy Resources Conservation Board, he nevertheless went on to find that the plan would not offend Alberta's Individual's Rights Protection Act, which at the time did not contain an affirmative action provision. He reasoned that such a program would not "discriminate against" non-native persons:

> The purpose of the plan...is not to displace non-Indians from their employment, but rather to advance the lot of the Indians so that they may be in a competitive position to obtain employment without regard to the handicaps which their race has inherited.

Ritchie J. stated that he found "no material assistance" in Bakke and Weber "because each of them is dealing with a situation fundamentally different from that facing the Athabasca Indians". The Athabasca plan appears to have been broader than the Davis and Kaiser plans. In addition, the Alsands project involved bringing workers from the south into locations already inhabited by native people. These may have been the kind of differences meant by Mr. Justice Ritchie.

Laycraft J.A. at the Court of Appeal had held that a program proposed by the Tribal Council was not permitted under the Alberta Individual's Rights Protection Act since it would constitute reverse discrimination, offending section 6 of the Act. Section 6 was the anti-discrimination provision. Furthermore, section 7 of the Act, which prohibits discrimination in advertising, application forms and all inquiries, would make it impossible to put such a plan into practice.

(d) Possible Standards which might be imposed in Affirmative Action Programs

Section 15(2) is available to the government as a defence for programs challenged under section 15(1). If it is accepted that under some circumstances courts will be able to order affirmative action as a remedy under section 24(1), then section 15(2) would also serve to prevent section 15(1) from forbidding such a remedy. In either case, the court may apply standards which must be met before a program is considered a section 15(2) program, as discussed in this portion of the paper.

Some suggestion of guidelines may be found in regulations under the Saskatchewan Human Rights Code which requires persons wishing to establish a program in Saskatchewan to obtain permission from the Commission. Regulations under the Saskatchewan Code set out requirements for such a program. The American cases have also discussed standards, briefly mentioned in the discussion of Bakke above. Further discussion occurs in Weber and Fullilove. Finally, there is a discussion of standards in Action Travail des Femmes v. Canadian National. These are noted in this section merely to indicate the kinds of standards which the court might impose on section 15(2) programs. There is no suggestion that these would be determinative of any standards which the court might develop.

The Saskatchewan regulations require that a program must be directed towards target groups, named as persons of Indian ancestry, the physically disabled and women. Normally, a program must encompass all these groups. However, under certain conditions, a program may be directed towards one target group or even only a portion of that group. For example, in In the matter of an application for approval of S.U.N.T.E.P. (Saskatchewan Urban Native Teacher Education Program) by Gabriel Dumont Institute of Native Studies and Applied Research (1980), 1 C.H.R.R. D/131, the purpose of the application was to train native teachers, specifically Métis and non-status Indians. Athough the program was not directed at all Indians, the Commission permitted it because there already were programs for status Indians elsewhere. Since the Dumont Institute had been established specifically to address and eliminate the disadvantages experienced by Métis and non-status Indians, the program was also allowed to exclude women and the disabled as separate groups. The Commission concluded that the responsibility for addressing the disadvantages of women and persons with physical disabilities must lie elsewhere. However, women of Indian ancestry and disabled persons of Indian ancestry would have to be included in the program since there can be no discrimination within a program. This requirement was noted in Application by the Saskatchewan Pipe Fitting Industry Joint Training Board (1981), 2 C.H.R.R. D/452 and Application by Northern Lights School Division No. 113 (1981), 2 C.H.R.R. D/593.

The Saskatchewan Commission will also approve programs which are designed to redress the disadvantages of "protected groups". Target groups are mandatory beneficiaries, protected groups may be included in a program. An example of a protected group is youth, specified in Application by Canada Employment and Immigration Commission (1981), 2 C.H.R.R. D/483 where the Commission granted an exemption rather than approval for a special program because the plan was for short term employment only.

The Saskatchewan Commission requires applicants to provide statistical evidence of the need for the program and the expectations of the program. In the S.U.N.T.E.P. application, for example, evidence was presented in relation to the proportion of teachers and students of Indian ancestry in the school system, the underrepresentation of Indian teachers in the system, and the means by which the plan could overcome the under-representation. The proposals set out in detail are requirements to be met by the applicants for the teachers program, the courses and their purpose, financial aid available, counselling and other student assistance. Similarly, in Application by Regina Plains Community College (1981), 2 C.H.R.R. D/605, a proposal for a program designed to overcome the disadvantages of women in non-traditional skilled trades, the under-representation of women in such trades was shown.

The Saskatchewan Commission may also impose conditions on applicants. For example, the Commission required the administrators of the Pipe Fitting program to support measures such as child care for female apprentices and to arrange for recruitment of disabled persons as apprentices, along with appropriate job accommodation. Similarly, in the Northern Lights Application, conditions relating to the recruitment of disabled persons and physical accommodation of buildings were imposed.

In Action Travail des Femmes, the Canadian Human Rights Commission discussed its criteria for compliance for special programs set out in a manual by the Commission. The basis for determining whether or not a program is needed appear to be similar under the Canadian Act to those set out in the Saskatchewan regulations. The employer is expected to provide information about the numbers or proportion of minority workers in certain job categories or in the workplace as a whole. Disproportionately high unemployment rates among certain groups will also be considered as an important factor in approving a voluntary program. In each case, statistics are employed to show "the degree to which the existing and potential labour force accurately reflects the relevant outside labour pool and to identify the area(s) in which groups may be at a disadvantage, measured by the extent to which they are underrepresented or over concentrated within the organization". Another factor in relation to voluntary programs is the extent to which past practices have resulted in present discrimination. The Commission cites several examples from the manual: for example, physical requirements which "may tend to eliminate members of shorter races"; an assumption that members of certain groups, such as married women, would be unable to meet a requirement of geographical mobility; and the exclusion of certain groups from application at entrance level positions which "will have left a heritage of a disproportionately low number 'qualified by company experience' for promotions into more senior positions".

In the American cases, the question of quotas is an important one, as discussed above. Although Justice Powell had no difficulty with the principle of affirmative action in Bakke, he did have some difficulty with the quota arrangement in the Davis plan. The quota seems to be of less consideration when it is cushioned by other provisions, as shown by Weber. In Weber the plan intended to increase the proportion of black workers at Kaiser Aluminum was approved because it was designed "to break down old patterns of racial segregation and hierarchy"; it did not "unnecessarily trammel the interests of the white employees" by requiring their dismissal and replacement by blacks; half the trainees would be white; and the plan was temporary, "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance". The Weber guidelines were followed in La Riviere v. E.E.O.C., 29 E.P.D. No. 32,802 (1982) (U.S. Court of Appeals, 9th Cir.), to allow the California Highway Patrol to set up a voluntary two year affirmative action program to determine whether to utilize women highway patrol officers.

It is also possible that affirmative action or special programs which involve a generally disadvantaged group will not be upheld if the group is not in fact disadvantaged in relation to the specific area in which the program is employed. For example, in Hogan v. Mississippi University for Women, 102 S.Ct. 3331 (1982), a male applicant's refusal of admission to the nursing school was defended on the ground that the all-female school compensated for the disadvantages endured by women. Justice O'Connor, for the U.S. Supreme Court, rejected this submission because women have not suffered disadvantages in relation to nursing. Similarly, the affirmative action program implemented by the Equal Employment Opportunities Commission was not upheld by the Court of Appeal because the EEOC already had a history of hiring employees from minority backgrounds (Jurgens v. Thomas, 30 E.P.D. #30,090).

In his separate judgment in Fullilove, Justice Powell cited factors upon which the American Courts of Appeals have relied in relation to race conscious hiring remedies. These factors include "the efficacy of alternative remedies", "the planned duration of the remedy", "the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or workforce". The last two factors were referred to also in Weber and the last factor is one that is important in the Saskatchewan cases. He also referred to "the effect of the

[10%] set-aside upon innocent third parties [which was at issue in Fullilove]". In Fullilove, "innocent third parties" were contractors who had not discriminated in hiring. In respect of this factor, some effect is permitted and the real question is whether or not it is more than is necessary in order to achieve the goal.

Another way of determining whether or not an affirmative action program should be approved is by subjecting it to a more general test, which might include referring to some of the factors set out above. [illegible] example, in Re Athabasca Tribal Council, Morrow J.A. stated that affirmative action could be justified on the same principle as the Supreme Court of Canada had upheld laws applying to one class of persons; that is, that they had a valid federal objective. In Fullilove, the United States Supreme Court applies a similar test, but one involving both objective and means. In that case, it found that the objective, which was to ensure that grantees who participated in the public works funding program would not use procurement practices which might result in perpetuation of the effects of prior discrimination, was within the power of Congress. The court commented that Congress would have more leeway in determining means than the objective, but would still have to ensure that "any Congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal". Under the public works fund granting arrangement, the means also met the requirements of the equal protection clause.

Section 15(2) does not give much guidance as to the standards which might be set down. It is limited to affirmative action programs which are directed towards groups protected under 15(1), enumerated or judicially added. The same groups listed under 15(1) are listed under 15(2). The word "including" in 15(2) indicates that the list is not exhaustive. In any case, the purpose of 15(2) appears to be to indicate that the guarantee of equality which apparently extends to certain groups under 15(1), whoever they might be, does not preclude affirmative action programs directed towards those groups.

Unlike under the Saskatchewan regulations, a program under the Charter would not have to be directed towards all of the listed groups. Furthermore, it is likely that the program can be tailored to help a specific group or member of a broader category. For example, it is possible that a specific program could provide special assistance for deaf persons, without providing assistance to all other disabled persons. Indeed, a program which was overly broad and not sufficiently "tailored" might be vulnerable to challenge. However, it is also likely that a program cannot be in itself discriminatory. In other words, the program designed to help deaf persons could not limit the program only to men, unless the government could show that in that case men were more disadvantaged than women.

The kind of ends-means analysis embarked upon by the Supreme Court of the United States in Fullilove and hinted at by Morrow J.A. in Re Athabasca Tribal Council (Court of Appeal) may also be applied under section 15(2), which specifically states that a program has to have the betterment of the conditions of disadvantaged groups or individuals "as its object". Presumably, then, the courts will expect the government to show that that improvement of the target group's condition is indeed the object of a particular program or piece of legislation and that the object can be achieved through the program. The government would have to provide evidence that members of the group are in fact disadvantaged*. But it may be that "object" will be read to refer only to the reason for establishing the program or will be intepreted in such a way as to expect the government to show that improvement can be reasonably expected to result from the program.

Section 15(2) states that the group must be disadvantaged because of race, etc. In other words, there must be a connection between the disadvantage and the ground. For example, it may not be sufficient that elderly women are in fact disproportionately poor: to establish a special program it must be shown that they are poor because they are elderly women.

It is also likely that a program could be challenged on the basis that it has outstayed its welcome -- the object has been attained and it is no longer necessary. Such a criterion may require monitoring of programs or assessment by the courts at the request of a plaintiff who believes him or herself to be denied a benefit as a consequence of an affimative action program directed at assisting a no longer disadvantaged group.

A desire to help a particular group overcome past and/or present discrimination might result in continuing different treatment of that group. The object of a program defended under section 15(2) should be to improve conditions which have had negative repercussions for the members of a particular group, not set them apart as a distinct group subject to separate provisions on a permanent basis.

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* This raises another issue, the meaning of "disadvantaged". The term may be interpreted broadly to refer to general economic status, for example, or more restrictively, such as the proportion of the group completing high school, or both, depending on the context. If and where it is defined narrowly, the courts may restrict programs protected by section 15(2) to those addressing that particular disadvantage.

Some international human rights instruments provide for this situation. For example, section 4 of Article 1 of the United Nations Declaration on the Elimination of all forms of Racial Discrimination states that special programs shall not be considered discrimination "provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved". A similar provision can be found in the Convention on the Elimination of All Forms of Discrimination against Women (section 1, Art. 4).

A further concern is whether affirmative action can be imposed on groups which do not want it. For example, lower minimum wage levels for a particular group or for occupations dominated by members of a particular group might be established on the ground that this would increase employment for the group. Similarly, members of a group might be excluded by law from certain occupations on the basis that it was necessary for their own protection. Could members of the group affected challenge such legislation? Under international law, there is some authority for the view that special programs cannot be imposed on minorities: in a dissenting opinion, one judge "held that steps to protect minorities cannot be imposed upon members of the group, who consequently have the choice to accept such steps or not" (Bayefsky, 9). However, while a member of a group would not be legally forced to take a job at a lower minimum wage by the mere existence of the legislation, he or she would have little choice as to whether employees offered jobs at lower pay. Accordingly, he or she might prefer the program not exist at all.

Such a person on whose behalf the purported affirmative action had been implemented would argue that the program was not affirmative action at all because it did not improve the conditions of the group but perhaps even worsened them. One question which arises is whether the person challenging the program on this basis (possibly as an intervenor in a case between the government and a member of the "non-disadvantaged" group) or the party defending the program would have the onus of showing the program did or did not have the object of ameliorating the conditions of the disadvantaged group. It would be more consistent with the general regime under the Charter that the party defending the program would have the onus of showing that the object was to help the group. However, the extent to which section 15(2) conforms to the "general regime" is not clear; furthermore, the group may be in the position of rebutting the claim made by the government. As an intervenor, the group would be providing information and perspective to the court, rather than engaged in presenting a case as a party. How difficult it would be to satisfy the onus depends in part on how "object" is interpreted, with the emphasis on purpose or reason for the program or on anticipated results.

Finally, are there circumstances under which the government will be required to institute affirmative action? A definition of equality which includes recognition of basic needs raises the question of whether guarantees of equality require the government to institute programs which respond to special needs. If equality in section 15 does sometimes require different treatment in response to the needs of groups differently situated, a failure to take special needs into account may infringe section 15(1). But does that require the government to institute affirmative action? The essence of affirmative action is the attempt to redress past and continuing discrimination by ensuring, for example, that the members of the minority group are considered fully for the kinds of positions which they have been denied. Being given an equal opportunity to apply for whatever it is one was denied constitutes a remedy for discrimination and, as is discussed below in this section of the paper, it is possible that affirmative action may be ordered under section 24(1).

Affirmative action may be a particularly appropriate response to constructive discrimination which tends to involve widespread (systemic) historical discrimination necessitating extensive redress applying not only to the successful plaintiff, but to other persons subject to the same pattern of discrimination. However, a finding of direct discrimination may also attract an affirmative action remedy. A discriminatory facial classification on a protected ground may also mean that persons with that characteristic have long been excluded from benefits or opportunities. The remedy sought may involve more than a declaration that the legislation is invalid. The plaintiffs may seek a remedy which also attempts to overcome the long-term deleterious effects of the legislation -- one which attempts to place persons with that characteristic on an equal footing with persons without the characteristic.

However, if equality requires recognition of special needs which in turn suggests that past as well as current and continuing discrimination be redressed on a scale wider than the individual plaintiff, there may be a duty on the government to institute affirmative action. If there is such a duty, a failure to institute special programs could give rise to a challenge under section 15. The answer to this question involves the much larger question of whether the Charter imposes a positive duty on the government to act*.

It seems more consistent with the general regime under the Charter that it prohibits government from infringing rights but does not go the step beyond to impose an obligation on the government to take certain action (such as provide specific programs) except insofar as may be ordered as a remedy in a specific case. Then while a successful plaintiff could seek to have such a remedy enforced, the failure by government to establish a similar program on its own volition would not constitute the basis for a challenge.

(e) Applicability of Section 15(2)

Regardless of whether legislation or a program is defended by government on the basis that it is affirmative action within section 15(2) or whether a plaintiff seeks affirmative action as a remedy, it is likely that some standards whether those indicated above or others, will be imposed by the courts. The onus of showing that the standards have been met will be placed on the party invoking section 15(2).

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* This question should be distinguished from the question of whether government will be obliged to show under section 1 that reasonable accommodation would not permit a person who has been discriminated against to enjoy a benefit or satisfy a requirement; in other words, whether discrimination could be avoided by reasonable accommodation. It may be that a "reasonable" limit is one which has been imposed only after consideration of whether reasonable accommodation would have enabled the plaintiff to enjoy the right denied.

The government will attempt to justify some apparent instances of discrimination on the basis that they are affirmative action or special programs. For example, if a branch of government has a program to train women mechanics or sets up a hiring system which is designed to result in an improved hiring rate for female mechanics and a male applicant brings a challenge to the program under section 15(1), section 15(2) would constitute a possible defence for government. To establish the defence the government might have to show that women are denied mechanics' positions because of their sex, the program is needed, that it can achieve its "object" of bettering women's employment conditions, that it does not restrict the employment opportunities of men unnecessarily, and that it does not discriminate against racial minority women or disabled women, for example, among other relevant variables constituting the appropriate standard for such programs.

As far as the government's invocation of section 15(2), there is some question as to where the courts will apply the guidelines: under section 15(2) itself or under section 1. To some extent, a means-ends analysis invites the application of section 1, since that is part of the process involved under section 1. However, section 1 applies to "rights and freedoms set out in [the Charter]". If affirmative action is not a right, and it does not appear to be, section 1 is not strictly applicable to it. On the other hand, if section 15(2) is merely seen to be a clarification or interpretation of section 15(1), it could be argued that it is section 15 as a whole which is relevant. Presumably section 1 does apply to section 15.

If section 15(2) is subject to section 1, then the government will have to show that the program is "prescribed by law", however that is defined by the courts. However, if the standards are imposed under section 15(2) itself, there may be greater leeway for the courts in this regard. The affirmative action would not have to be in the form of a law since section 15(2) refers to "any law, program or activity". Even so, presumably quite apart from Charter requirements, there has to be some authorization in law for government action. Thus a program or activity must have a reference point in legislation, even though itself is not in the form of a law. Depending on how prescribed by law under section 1 is defined, this may be a more flexible requirement under section 15(2) than under section 1.

The existence of section 15(2), which indicates that not all differentiation on prohibited grounds is forbidden, may also remove the barrier that might otherwise prevent the ordering of affirmative action as a remedy under section 24(1). The appropriateness of such a remedy would, of course, have to be considered under section 24(1) itself. Although the Court could order a program on its own initiative, the detail required to formulate such a program is not likely to encourage such an approach. The plaintiff would presumably be required to set out a proposed program and would have the onus of showing it meets the guidelines.

Under the Canadian Human Rights Act, a tribunal has the jurisdiction to order a respondent against whom a complaint of discrimination has been upheld, to institute an affirmative action program. The first such order was recently made in Action Travail des Femmes, discussed above. The complaint in that case was based on systemic discrimination against women by C.N. in its hiring practices. The Tribunal found that the complaint was justified and ordered C.N. to undertake an affirmative action program. It required C.N. to invite women to apply for non-traditional positions, to fill at least one in four non-traditional positions with a women until the percentage of women in non-traditional jobs at C.N. had reached thirteen. It qualified its order by stating the program was to take effect only when C.N. employees who had been laid off had been recalled by C.N. However, it apparently intended that the program begin within one year regardless of whether or not those employees had been recalled. The Tribunal commented that it would have preferred to have required C.N. to hire women to fill at least one non-traditional position out of three but that that would not have been realistic. An affirmative action program was also ordered by a Board of Inquiry under the Ontario Human Rights Code. In Hendry v. Ontario Liquor Control Board (1980), 1 C.H.R.R. D/160, the Board permitted the Ontario Human Rights Commission to help set up a program with the Liquor Control Board in order to redress the imbalance between male and female workers.

It should be pointed out that the courts may decline to order special programs as a remedy because of traditional judicial reluctance to monitor the implementation of remedies. Or this reluctance may be manifested in a refusal to order overly detailed programs but a willingness to make a general order for the improvement of conditions.

SUMMARY OF PAGES 379-390

8. The Effect of Section 28 on Sex Equality Under Section 15

Issue is whether section 28 affects the status of sex equality under section 15.

(a) Backgound

Consideration of Joint Committee proceedings and Article 3 of the International Covenant on Civil and Political Rights.

(b) Approaches

(i) Approach 1: Section 28 has the effect of absolutely prohibiting all sex discrimination

This view holds that sex discrimination cannot be justified under section 1, that the guarantee of sex equality cannot be overridden by section 33, that section 28 takes precedence over sections 25 and 27 and that it may apply to section 26 rights.

Based on the wording of section 28 and on the view that it is not necessary to permit discrimination on the grounds of sex in order to satisfy recognition of biological differences and the privacy ethic.

(ii) Approach 2: Section 28 ensures sex equality cannot be overridden but permits justification of sex discrimination

This view agrees with approach 1 with regard to the effect of section 33 and with regard to the interaction of section 28 and sections 25, 26 and 27. However, it holds that it is possible to justify sex discrimination under section 1. It agrees with approach 3 that section 28 requires that the highest standard of review is to be applied to sex discrimination.

Based on the wording of section 28 and on the assumption that the courts will find it necessary to recognize both biological differences between the sexes and the prevailing privacy ethic of Canadian society.

(iii) Approach 3: Sex discrimination is to receive the highest standard of review

This view holds that the only effect of section 28 will be to ensure that a high standard of review will be applied to discrimination on grounds of sex, if different standards are applied to different grounds.

Implications of the Approaches

Approach 1 would mean that no sex discrimination would be permitted. Approach 2 would mean that guarantees of sex equality could not be overridden but that sex discrimination could be justified under section 1, subject to the highest standard of review applied by the courts. Approach 3 would simply protect sex from a lower standard of review than discrimination on other grounds might receive if more than one standard were applied by the courts.

8. The Effect of Section 28 on Sex Equality Under Section 15

Section 28 states:

> Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

The actual effect of section 28 has been the subject of some debate. There are three views. One is that section 28 has the effect of prohibiting all discrimination on the basis of sex. The second view is that section 28 prevents the application of section 33 to sex equality under section 15 but not from the impact of section 1. The third view is that it was intended merely to ensure that sex discrimination receive the strictest level of review should the courts apply different standards to different grounds.

(a) Background

Several witnesses before the Joint Committee, including the Canadian Jewish Congress (Joint Proceedings, 7:93), the Canadian Human Rights Commission (Joint Proceedings, 5:8), the National Association of Women and the Law (Joint Proceedings, 22:66), and the Canadian Council on Social Development (Joint Proceedings, 19:30), recommended that an explicit statement of sexual equality be included in the Charter. Members of the Committee such as Pauline Jewett, Flora MacDonald, Coline Campbell and Svend Robinson also supported such a provision (Joint Proceedings, 9:70, 21:25, 21:31 and 9:149, and 4:55, respectively).

The model for section 28 is found in Article 3 of the International Covenant on Civil and Political Rights which reads:

> 3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

The Common Interpretation of the International Covenant developed by Canadian officials states that Article 3 in the international context is "in effect...a strict scrutiny clause, requiring the level of scrutiny to be especially high when a differentiation is based on sex" and possibly prohibits laws which have a discriminatory effect (Common Interpretation, 10-11). Article 3 is said to apply both to Article 2 and Article 26.

Article 2 of the International Covenant states in part:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant, undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Article 26 reads:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Just as Article 3 is related to other Articles of the International Covenant, section 28 must be related to other sections in the Charter. The most important provisions in this respect are sections 1, 15, 25, 26, 27 and 33.

(b) Approaches

(i) Approach 1: Section 28 has the effect of absolutely prohibiting all sex discrimination

On this view, section 28 would have the effect of removing sex equality under section 15 from the operation of both section 1 and section 33. It also would mean that aboriginal rights protected by section 25 and cultural practices protected by section 27 could not discriminate on the basis of sex. Finally, it might also mean that rights, the existence of which is protected by section 26, are guaranteed equally to male and female persons.

It is clear that section 33 does not apply to section 28 because section 28 is not among the sections listed under section 33. It can also be argued that section 1 does not apply to section 28. The words "Notwithstanding *anything* in this Charter" (emphasis added) seem to preclude the application of section 1 to section 28.

Since the equality rights-granting provision is section 15, not section 28, for all protected grounds including sex, in relation to sections 1 and 33 the real issue is the effect section 28 has on section 15 in relation to sex equality. Apart from any impact section 28 may have, sex discrimination which contravenes section 15 could be justified under section 1 and the guarantee of sex equality in section 15 could be overriden by invocation of section 33. This first approach suggests that the inclusion of section 28 results in different treatment for sex equality under section 15 in comparison with the other grounds.

As argued above (pp.118-119), rights and freedoms appear to be guaranteed by the Charter without internal qualifiers, and are subject to limitation only under section 1. (The contrary view is found above, at pp.121ff.) The rights, including sex equality, are to be guaranteed equally to male and female persons. But in the case of sex equality, the rights, including the section 15 right, are guaranteed equally to male and female persons "notwithstanding anything in this Charter." Section 1 is the only way rights can be limited and its application to sex equality is precluded by this interpretation of its interaction with section 28.

Since it is clear that section 33 is not meant to apply to section 28, it is likely that it is not available to override the guarantee of sex equality in section 15(1). This was the conclusion reached by the Nova Scotia Court of Appeal in Boudreau v. Lynch, et al (November 15, 1984, unreported). This case concerned a challenge to Nova Scotia's Family Benefits Act which requires men to be disabled before they are eligible for family benefits but does not require the same of women. Rejecting the appellant's main arguement that section 28 was intended to eliminate the three year delay for the implementation of section 15 provided for by section 32(2), as far as sex equality was concerned, Hart J.A. stated that the purpose of section 28 was

> to prevent any continuation of sexual discrimination by affirmative legislative action once the full Charter had come into force. By doing so the legislators have treated sexual discrimination as the most odious form of discrimination and taken away from legislative bodies the right to perpetuate it in the future. Other types of discrimination may without reasons being given be carried on under the legislative override provisions of section 33.

It is argued below that Canadian norms relating to privacy require sex differentiation. It is also argued that biological differences also require different treatment of men and women. This first approach accepts that men and women cannot always be treated in an identical fashion, and suggests that these two areas of concern can be accommodated within it. Indeed, it is quite likely that proponents of this view would also argue that equality requires recognition of different needs, a position applied to all minority groups, including women. Needs based on or resulting from biological differences between men and women and from privacy can be satisfied by an interpretation of equality which requires recognition of separate, distinct needs. The guarantee of equality applied equally to men and women, on this view, refers to the principle of equality, not to its content. The equal application of the principle requires that it take into account different needs.

It has been argued that the interpretation of section

28 proposed here would preclude affirmative action programs based on sex under section 15(2). The argument is that since section 28 applies "[n]otwithstanding anything in this Charter", it must apply to section 15(2), preventing special programs on the basis of sex. There are three responses to this argument. The first is that section 15(2) specifically refers to sex*. The second is the meaning ascribed to equality set out above: it requires different treatment. If this meaning is accepted, the different treatment can take the form of affirmative action. The third response is based on section 28's applicability to the rights and freedoms referred to in the Charter. Since section 15(2) is not a right, section 28 is not intended to apply to it.

The second aspect of this approach is that section 28 takes precedence over sections 25 and 27 in case of conflict between section 28 and either of those sections**. It might also be argued that section 28 may ensure that aboriginal rights or cultural practices which involve different treatment of or effect on men and women cannot be sustained by reference to sections 25 or 27, respectively.

Section 25 is an interpretive provision which requires that the Charter be interpreted in a way which does not abrogate or derogate from any aboriginal rights. It does not itself guarantee a right other than a right to a specific mode of Charter interpretation. However, section 25 does refer to "rights". In this respect, it should be noted that section 28 applies to rights "referred to" in the Charter (emphasis added), not only to rights guaranteed by the Charter. Accordingly, it can be argued that section 28 applies to the rights referred to in section 25.

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* The opposing view would be that the obvious applicability of section 15(2) to sex means that section 28 cannot be read to prohibit all differentiation on the basis of sex.

** It is possible to accept the view that section 28 means that neither section 25 nor section 27 can be employed to justify sex inequality without accepting that section 28 prohibits all forms of sex discrimination or sex inequality.

Section 27 is also an interpretive section. It requires that the Charter be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". For section 27 to come into effect, a Charter right or freedom must be the subject of interpretation. Because of section 28, the right or freedom is guaranteed to male and female persons equally "[n]otwithstanding anything" in the Charter, including section 27. Thus, according to this view, section 27 cannot be used to sustain sexual inequality inherent in particular cultural practices.

The final point to be made here is that section 28 may be employed to ensure that rights existing outside the Charter are to be applied equally to men and women. Section 26 states that rights already existing in common law or statute will continue to exist. The Charter does not substitute a specified list of rights and freedoms for those which existed prior to the proclamation of the Charter. These are rights and freedoms referred to in the Charter, although they are not guaranteed by the Charter*. Since section 28 applies to rights "referred to" in the Charter, it may be that these rights are also guaranteed equally to male and female persons.

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* Because they are not guaranteed by the Charter, section 24 is not available in relation to contraventions of such rights. This raises the question of whether section 28 can then be invoked independently to apply to section 26 rights.

Implications of this Approach

The major implication of this approach is that sex discrimination can never be justified under section 1. However, as indicated, this does not mean that men and women are to be treated identically. The advocates of a special sex equality provision were prompted by the history of sex discrimination in Canada and the United States. The intention was to ensure that the courts not have the discretion to permit detrimental sex equality. The arguments allowing different treatment having a positive effect are consistent with this view of the reason for section 28. Nevertheless, a prohibition of all other instances of sex discrimination may be unduly restrictive.

In relation to section 25, one implication of approach 1 would be that membership in Indian bands could not be determined on the basis of sex. However, it could be argued that the internal decision-making of bands is not subject to the Charter (see above, pp.34ff.). In that case, although the law could not state that men and women are to be subject to different membership rules, actual determination of the rules might be outside the jurisdiction of the Charter.

Finally, section 28 applies to all rights and freedoms. For example, freedom of religion cannot be infringed on the basis of sex, the vote denied on the basis of sex, the right to enter Canada denied on the basis of sex, the right not to be arbitrarily detained infringed on the basis of sex or the right of life, liberty and the security of the person denied without being in accordance with the principles of fundamental justice on the basis of sex. Even without section 28, section 15 would operate to the same result. However, if sex equality were protected only by section 15, it would be possible to override sex equality in the same way as it is possible to override any other form of equality in relation to those rights. For example, presumably section 33 could be invoked to override the guarantee of age equality in section 15. Freedom of speech could then be infringed on the basis of age. Discrimination on the basis of age could not then found a challenge to the law. On this first approach, there could not be a comparable override of sex equality.

(ii) Approach 2: Section 28 ensures sex equality cannot be overriden but permits justification of sex discrimination

This view agrees with approach 1 with one very important distinction. On this third view, section 28 would prevent the use of the override in relation to sex equality and would forbid sex inequality in relation to cultural and aboriginal rights, but it would not remove sex equality under section 15 from the operation of section 1. Sex discrimination could be justified under section 1, although always subject to the highest standard of review, as discussed under approach 3 below.

This view of section 28 is based on the nature of the rights guaranteed by the Charter. It defines the rights as subject to potential derogation under section 1. The rights which are referred to in section 28 are rights subject to section 1. A comparison of section 15 with section 2(d) helps to illustrate the argument. Freedom of association is not an absolute right. It is, like all the rights in the Charter, a qualified right since it is "subject...to such reasonable limits prescribed by law as can be demonstrably justified...". Thus, section 28 means, inter alia: "Notwithstanding anything in this Charter, the qualified right of freedom of association is guaranteed equally to male and female persons." This indicates men and women cannot be treated differently as far as freedom of association is concerned. Section 15 guarantees sex equality, subject to such reasonable limits as can be demonstrably justified. And section 28 therefore means: "Notwithstanding anything in the Charter, the qualified right to sex equality is guaranteed equally to male and female persons". Put another way, the right of sex equality is guaranteed to men subject to section 1 and it is guaranteed to women subject to section 1. Accordingly, the content of the equality right may be different for men than for women. Section 28 cannot change this, since it can offer nothing more than is already guaranteed by the rights granting provisions of the Charter.

Such an interpretation is required by the need to accommodate what are generally considered to be two legitimate sources of distinction on the basis of sex: biological differences between the sexes and the prevailing privacy ethic of Canadian society. The fact that only women can become pregnant is an example of a biological difference. It means that the control of some reproductive hazards in the workplace is required for women but not for men. The privacy ethic will be important in situations which involve disrobing, sleeping or performing personal bodily functions. We expect sexual segregation in such contexts and do not view it as inequality. Such segregation is not based on the assumption of the inferiority of one sex in relation to the other.

Implications of this Approach

This approach leaves the treatment of sex inequality within the discretion of the courts. They can define "biological" differences broadly. And biological differences could serve to ground decisions unfavourable to women. For example, although the reproductive hazards example as used above would benefit women, it could also result in justifying their exclusion from certain types of employment on the basis that it is in their best interests and necessary for the smooth functioning of the workplace. Of course, it is also possible that the courts would take a strict approach to sex discrimination since it would be within their discretion to do so. They then might be very reluctant to permit sex discrimination which had negative effects but willing to permit a broad range of different treatment under a definition of equality requiring recognition of different needs and under section 15(2).

(iii) Approach 3: Sex Discrimination is to receive the highest standard of review

This approach is probably relevant only if the courts apply different standards of review under section 1 to different protected groups in section 15, although it might also have an effect if the same standard is applied. On this view, section 28 is meant to avoid the debate which occurred in the United States about the level of scrutiny to apply to sex discrimination. The testimony before the Joint Committee made it clear that there was concern that the ambivalence of the American courts' treatment of sex discrimination might be imported into Canada (Joint Proceedings, 22:56, *inter alia*). It is also intended to avoid the result in the American cases in which the minimal and intermediate scrutiny standards, rather than strict scrutiny, were applied to sex discrimination (for a brief summary, see Williams). This view requires that the courts treat the presence of section 28 seriously.

Implications of this Approach

On this approach, section 28 would have an effect on the interaction between section 15 and section 1. Section 15 is strengthened in relation to sex equality and only the rarest cases of sex discrimination could be justified. This could be the "unspoken" effect of section 28 even if the same standard of review were applied to all grounds. The presence of section 28 might make courts reluctant to permit sex discrimination except in highly unusual situations. The implications under approach 2 are also applicable here.

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C. Procedural Issues

1. Procedural Issues Under Section 15

(a) Standing

To obtain standing, it appears that an individual must have had his or her own section 15 rights infringed.

Future infringements appear to be encompassed by section 24, especially if delay in bringing the action until the actual infringement occurs would be a mere formality.

If a finding of discrimination is not a necessary pre-condition, potential plaintiff will have to show merely unequal treatment or effect; if finding of discrimination is a pre-condition, potential plaintiff will have to show discrimination on an enumerated or judicially recognized non-enumerated ground.

It may be possible for groups to bring actions in relation to section 15; class actions will be governed in accordance with the rule of procedure.

Presumably the usual rules governing intervention will apply, including Rule 13 of the New Rules of Civil Procedure.

"Court of competent jurisdiction" probably includes administrative tribunals; section 24 does not extend the jurisdiction of the courts.

(b) The onus on the plaintiff under section 15

Plaintiff must show a *prima facie* case of denial or infringement of equality rights which will include a showing of discrimination on an enumerated or judicially recognized ground if discrimination is a precondition; if ground is not enumerated, plaintiff will have to show that it should be recognized as a protected ground.

Cases hold that the plaintiff need only show an infringement, not that it was unreasonable.

Discussion of the requirements of a *prima facie* case as set out in Canadian human rights, American and British jurisprudence.

(c) Evidence to be produced by Plaintiff under section 15

Discussion, based on Canadian human rights law, American and British jurisprudence, of the kinds of evidence plaintiffs might produce, including statistical evidence, patterns of treatment of the group of which the plaintiff is a member, specific treatment of plaintiff, expert evidence, circumstantial and direct evidence showing hidden intent.

(d) Remedies under section 24(1)

The Charter does not extend remedies which a court may order but does permit broad discretion to the court within its own jurisdiction.

Discussion of possible remedies, including declarations, injunctions generally, structural injunctions specifically, damages, reinstatement and affirmative action.

C. Procedural Issues

There are several aspects of procedure which are relevant to bringing an action under section 15. These are standing, the onus on the plaintiff, the evidence required for the plaintiff to make a prima facie case and remedies which might be available to a successful plaintiff. Related issues under section 1 are that the onus is on government, when the shift in onus occurs and the effect of section 52(1).

1. Procedural Issues Under Section 15

(a) Standing

(i) Under Section 24

A plaintiff may bring an action under section 15 through section 24 which permits a range of remedies. Section 24 reads,

> 24(1) Anyone whose rights or freedoms as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

To obtain standing under section 24, it would seem that an individual must have had his or her own section 15 rights infringed. The issue of whether or not only past infringements are encompassed by section 24 has not been conclusively determined. Professor Hogg has argued that there will be a strict application of section 24(1) requirements so that an individual must have had his own rights denied and only past infringements are actionable (Hogg, Canada Act, 65). However, a number of courts have taken a different view. Decisions on both sides of the issue are set out in the following paragraphs.

Marceau J. in the Federal Court of Appeal decision of Operation Dismantle, stated that "the function of the judiciary is, in principle, to state the law applicable to a present, not purely contingent and future, set of circumstances, on the basis of facts the existence of which is at least probable, not merely possible and hypothetical, in order to resolve an issue between present and compellable parties, not those beyond its jurisdiction. It is impossible to think that the courts can be called upon to deal with mere potential situations, that they are entitled to base their conclusions and directives on speculations, assumptions and conjectures coupled with hopes and expectations....". One commentator has suggested that Pratte J. also was of the view that only present infringements could be brought before the court (Murphy, 356). It is not clear from the case, however, that Pratte J. was in fact thinking of the time of the infringement when he referred to section 24, but rather to the requirement that plaintiffs must have their own rights infringed in order to bring a claim.

In Quebec Association of Protestant School Boards, Deschênes C.J.S.C. held that section 24 of the Charter permits claims on the basis of future infringements or anticipated infringements. The French version does not refer to a tense, but to the "victime de violation...", and therefore may more clearly permit anticipated infringements than the English version does. The Supreme Court of Canada did not deal with this issue one way or the other in the Quebec School Boards case. The plaintiffs in the Quebec Schools Boards case, however, were seeking only a declaration; in addition, as soon as the school year started, the plaintiffs would have had their rights infringed.

Medhurst J. in National Citizens' Coalition Inc. Coalition Nationale des Citoyens Inc. v. Attorney General of Canada, [1984] 5 W.W.R. 436 (Alta. Q.B.) held that "the wording in s.24(1) in the past tense would exclude actions that are based on impending breaches. A present violation would include those situations where the action is so reasonably foreseeable in the near future that concern is therefore present at this time". He applied the pre-Charter constitutional standing cases to accept judicial discretion in relation to standing on constitutional matters.

In R.L. Crain v. Couture, Scheibel J. stated that section 24(1) should not be construed narrowly to refer only to past infringements: "If s.24(1) is interpreted so that persons will be denied access to the courts until their rights have actually been violated, persons will be left without an effective means of enforcing their rights, and the rights will be rights only in theory". He also based his view on the inclusion of the term "infringed" in section 24(1). He contended that the term should be given a meaning independent of the term "denied", and that it is "broad enough to encompass present threats to a person's rights or freedoms". However, it is possible that "infringed" may mean only that there has been some incursion into the right, while "denied" will indicate that there has been a complete supression of the right.

Mr. Justice Scheibel also attempted to make a distinction between what a plaintiff must do prior to bringing an application and what the plaintiff must do in the process of bringing the application. In his view, it is not necessary to establish a violation of rights in order to commence an application under section 24(1), but "the establishment of a violation of rights is a prerequisite to the obtaining of a remedy". He concluded with the somewhat confusing statement that "[t]here should be no doubt that in order to bring a s.24(1) application it is necessary only that the applicant allege that his rights have been infringed or denied". The justification for permitting claims of impending infringements is that the expectation of impending infringements might have immediate effect on the plaintiff. In other cases, waiting for the infringement actually to occur may be a mere formality since once the legislation took effect, the infringement would naturally follow. Furthermore, restricting section 24(1) to present infringements might require individuals to break the law merely in order to challenge the legislation (neither of these last two positions are discussed by Mr. Justice Scheibel).

Mr. Justice Sheibel did hold, however, that claims under section 24 can only be made by individuals who can claim that their own rights have been or will be infringed. The plaintiff under 24 must show that "a right personal to him has been violated or threatened, or...that the threat of a violation is immediate enough to justify the court exercising its discretion in favour of granting a remedy".

These issues may have been settled by the Supreme Court in Operation Dismantle. There the Chief Justice at p.6 of the majority judgment, and Madame Justice Wilson agreed at p.43 of her reasons that plaintiffs making an application, even for a declaration under the common law, must show either an actual violation or threat of violation of their rights under the Charter.

Elsewhere in this paper, there is a consideration of whether a finding of discrimination is a necessary precondition of a finding that section 15 rights have been infringed. If a finding of discrimination is not a necessary precondition, the individual will merely have to show unequal treatment or effect, regardless of its basis. If it is a precondition, a potential plaintiff will have to show that he or she has been discriminated against on one of the protected grounds, either enumerated or judicially recognized. In Jain v. Acadia University (1984), 5 C.H.R.R. D/2123, the board found that the individual complainant did not belong "to a class, group or segment of the population which were the intentional, or unintentional, target of rules, regulations or other requirements which unfairly or discriminatorily restricted them in their search for employment". It therefore dismissed the complaint because human rights legislation prohibits only discrimination which is based on group membership.

It is not clear who is encompassed by section 15 which guarantees equality rights to "every individual". Hogg says that phrase "probably excludes a corporation" (Hogg, Canada Act, 50), particularly in light of the fact that the original word used in section 15 was "everyone" which would have included a corporation. The word "anyone", used in section 24, includes a corporation (Southam (juvenile trials case)). But section 24, while broad enough to include all the rights guaranteed by the Charter, cannot extend the rights; in other words, if a right does not accrue to a corporation, as is likely the case with section 15, section 24 cannot be employed to make it do so. For example, Nortown Foods Ltd. would have standing under section 2(a) which uses "everyone" (R. v. Videoflicks); Southam Inc. would have standing under section 2(b) which also uses "everyone" (Southam (juvenile trials case). However, it is far less clear that these plaintiffs would have standing under section 15.

There is also the question of whether "groups" who do not have legal status as "everyone" or "anyone" can bring actions under section 15. Does section 15 permit "class" or representative actions? This question will have to be determined in accordance with the rules governing such actions in the Ontario Rules of Civil Procedure. The New Rule 12 is the same as the former Rule 75 and reads:

> 12.01 Where there are numerous persons having the same interest, one or more of them may bring or defend a proceeding on behalf of or for the benefit of all, or may be authorized by the court to do so.

But does the term individual specifically take section 15 out of the rule? Even if it does not, the rule requires that the person bringing the action have the same interest as the other persons in the action. That means whoever is included in a section 15 action must have had his or her own equality rights infringed.

A final point to be considered in relation to standing is that in many instances, a contravention of the Charter will also constitute a contravention of the Ontario Human Rights Code. The question arises as to whether or not a potential Charter plaintiff must exhaust Code remedies before resorting to the Charter. The Code is comprehensive in relation to the areas that it covers and has specific enforcement provisions. It could be argued that such comprehensiveness requires that matters coming within its jurisdiction should be dealt with under the Code first. Furthermore, the principle of judicial restraint, would suggest that a complainant exhaust non-constitutional remedies.

Moreover, in individual cases, the Code may be more appropriate since it is directed to individual contraventions. On the other hand, having to invoke the Code, especially in cases where it is likely the case would be considered later under the Charter, may unnecessarily protract proceedings.

Section 24(1) in referring to "court of competent jurisdiction" likely includes administrative tribunals and might include a Board of Inquiry under the Ontario Human Rights Code. As a result, certain Charter infringements could be raised under the Code if relevant (such as unreasonable search and seizure). However, it is unlikely that a remedy for contravention of section 15 can be brought before the Board of Inquiry in a Code case since the Board is established specifically under the Code and to inquire into a contravention of the Code.

Potential intervenors should consider the principles as set out in pre-Charter cases, especially whether they can present submissions which the parties are not likely to; cost; delay; and consent of the parties. Rule 13 of the new Rules of Civil Procedure should also be examined (former Rule 504a).

(ii) Under Section 52

A plaintiff may seek a declaration under section 52 as long as there is a violation or threat of his or her Charter rights. In Big M Drug Mart, Dickson J. (as he then was) stated at page 498 that a plaintiff may come to court as an interested citizen and in such "public interest litigation", the standing requirements are those set out in the pre-Charter cases of Thorson v. A.G. Canada, [1975] 1 S.C.R. 138; Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265; and Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 265. And in

Operation Dismantle, neither Madame Justice Wilson nor the majority dispute that a declaration may be sought under section 52 (p.6 of the majority judgment and p.43 of Wilson J.'s reasons).

(b) The Onus on the Plaintiff under Section 15

Regardless of whether a finding of discrimination is necessary to a finding of an infringement of section 15 rights, it would appear that the onus is on the plaintiff to show a *prima facie* case of a denial or infringement of equality rights or threat of such infrigement or denial (Operation Dismantle). If the plaintiff is successful, the onus then shifts to the government to justify the infringement under section 1. This will be the onus whether the claim is based on direct discrimination or on constructive discrimination.

If the claim is being made on the basis that the plaintiff has suffered discrimination (either because the plaintiff has chosen to make the claim on that basis or because section 15 requires her to do so), the plaintiff must first show discrimination because of her membership in a protected group. (The discussion of how non-enumerated grounds may receive judicial recognition appears above on pp.326ff. The plaintiff will in certain cases initially have to show that the particular class of which she is a member *is* a protected class). Professor Eberts has indicated the difficulties which may be involved in defining a particular group. She notes that the cases have generally dealt with broad, well-defined groups such as blacks or women "where it could be assumed that all, or most members...would be hurt by the requirement". However, in *Malik* vs. *The Ministry of Government Services, et al.*, in which an individual from Pakistan complained that the interview process which he underwent discriminated against him because of cultural differences,

> the group is very ill-defined; its boundaries depend on intangibles like 'upbringing', 'culture' the degree of modernization or Westernization in a person's country or origin, and the length of time in Canada.

This kind of vague "group" may not be cohesive or discrete enough to gain protection under the Charter, particularly for purposes of constructive discrimination claims, if they are permitted by the courts.

Once the group is recognized as constitutionally protected, or automatically is recognized because it is enumerated or the anti-discrimination clause does not apply, the plaintiff must establish she had her rights infringed. Crucial to this requirement is an understanding of what the "right" (or "freedom") is. It has been argued above that the rights do not contain internal qualifiers. Section 24 refers to rights or freedoms, "as guaranteed by this Charter". Section 1 "guarantees the right and freedoms set out in it" and then goes on to state the limits that can be applied to those guaranteed rights. The combination of sections 24 and 1 could support the argument that the rights do not contain internal qualifiers, and that respondents must demonstrably justify proposed limits. To gain standing, under this argument, a plaintiff would have to show only that the right as stated in section 15 is infringed.

However, if there are internal qualifiers in section 15 rights (such as capacity, as discussed above, at pp.254ff.), the onus will probably then be on a plaintiff to show she has not had the qualified right infringed. Thus if the qualification relates to capacity, the plaintiff will have to show first that she is capable of enjoying the right and then that her right has been infringed.

In any case, whichever approach is employed there will have to be a two-stage process:

(1) If the right is internally qualified, the plaintiff will have to show the qualified right is infringed and if he or she is successful, the government will have a chance to justify it through section 1.

(2) If the right is not internally qualified, the plaintiff will have to show an infringement of that unqualified right and if she is successful, the government will have an opportunity to demonstrate the infringement is justified under section 1.

The real issue, then, is who has the onus in relation to different aspects of the infringement or, put another way, who has the brunt of showing capacity or reasonableness. The scheme outlined above in point 2 seems to be more consistent with the scheme of the Charter. It might be argued that section 1 was included not only to relieve the courts of the need to find the qualifications within the rights and freedoms themselves, but also to indicate that the courts are not to find qualifications or limits within the rights, unless there is an explicitly modified right (such as unreasonable search or seizure). It also means that the plaintiff will not have to show that which should be within the government's knowledge if it wishes to infringe rights -- the lack of capacity (or whatever may be the reason) which justifies the infringement. MacKinnon A.C.J.O., for the Ontario Court of Appeal, expressed that view clearly in Southam (juvenile trials case):*

> I cannot accept the proposition urged upon us that, as the freedoms may be limited ones, the person who establishes that, prima facie, his freedom has been infringed or denied must then take the further step and establish, on the balance of probabilities, the negative, namely, that such infringement or limit is unreasonable and cannot be demonstrably justified in a free and democratic society.

Tests drawn from the human rights caselaw, set out below, which require the plaintiff to show she was denied a position at least in part because of a prohibited ground and other facts relevant to the case make most sense in the context of employment discrimination. However, they can be adapted to respond to other situations, including the denial of various government benefits.

In Etobicoke, McIntyre J. set out the onus on the complainant and on the respondent under the Ontario Human Rights Code

> Once a complainant has established before a board of inquiry a prima facie case of discrimination, in this case proof of a mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a bona fide occupational qualification and requirement for the employment concerned. The proof, in my view, must be made

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* For a different view, see above, footnote p.78.

> according to the ordinary civil standard of proof, that is upon a balance of probabilities.

In Etobicoke, there was an age classification on the face of the retirement provision. However, in other cases, there may only be an inference of discrimination which requires more than merely showing a classification in the legislation. For example, in Offierski v. Peterborough Board of Education (1980), 1 C.H.R.R. D/33, a female teacher claimed she had been denied a vice principal's position because of her sex. Professor Cumming as set out the onus as follows:

> For the Complainant to be successful, the first requirement is that the Complainant establish a prima facie case of discrimination on the basis of her sex. To do this she must show (1) that she was qualified for a position for which she applied (2) that despite such qualifications she was rejected and that (3) subsequent to her rejection the position remained open, or alternatively that an applicant of the opposite sex of apparently lesser qualifications was chosen for the position.

If the complainant is successful, the onus shifts to the employer "to provide an explanation that is reasonable".

In Cameron v. Nel-Gor Castle Nursing Home, Professor Cumming applied a similar standard when the discrimination was on the basis of handicap:

> Cindy Cameron has a "handicap" within the meaning of [the Code], she applied for a position of employment at Nel-Gor, which position was available at the time, she was not hired for the position, and the only reason she was not hired was "because of (her) handicap" as defined by [the Code].

It should be pointed out that the law is clear that discrimination need be only one motivating factor, not the only one. This point is discussed below at p.412. In Cameron, Cameron's handicap may have been the only reason she was not hired; however, her case would have been the same even if it were only one of several factors.

The Offierski onus is similar to that set out in McDonnell Douglas Corporation v. Green. In that case, the complainant, who had engaged in unlawful protest against the company, now claimed that he had been discriminated against when he was refused a position with McDonnell Douglas. The court stated that a prima facie case could be made out by evidence that the complainant belongs to a racial minority, that he had applied for a position with McDonnell Douglas for which he was qualified, that he was rejected, that the job remained open and that the employer continued to seek applicants with the complainant's qualifications. The employer then assumes the burden of showing a legitimate, non-discriminatory reason for the complainant's rejection (which was satisfied here by Green's unlawful conduct). The complainant then has the opportunity to show that this reason was a pretext. For example, Green could have shown that McDonnell Douglas had not rejected white applicants who had unlawfully protested against the company or that generally McDonnell Douglas had engaged in discriminatory practices against racial minorities. The Supreme Court clarified the onus on the employer in Texas Department of Community Affairs v. Burdine, 25 E.P.D. No. 31, 5444. There it is stated that the employer does not have to show by a preponderance of evidence that he had non-discriminatory reasons to reject the applicant; nor does he have to show that the person hired had superior qualifications.

Prewitt v. U.S.P.C., 27 FEP cases 1043 (5th Cir., 1981) applied the McDonnell Douglas-Burdine standard to disability constructive discrimination cases. It was held that the complainant establishes a prima facie case by showing he was qualified for the position except for the handicap, that the handicap prevents him from meeting physical criteria for the position and that the standards set by the employer have a disproportionate impact on persons with the complainant's handicap. The employer then has the burden of showing that the physical standards or criteria are job-related and that persons with the complainant's disability cannot, with reasonable accommodation, safely and efficiently perform the essential tasks of the job.

McDonnell Douglas and Burdine were considered in Base-Fort Patrol Ltd. v. Alberta Human Rights Commission (1982), 4 C.H.R.R. D/1200 (Alta. Q.B.). The Board of Inquiry in the case had found that the complainant had been discriminated against on the basis of sex when her employer had terminated her employment. It had ruled that there was an onus on the employer to prove it had a non-discriminatory reason for dismissing her and that the employer did not satisfy the onus. The Board had found that there was some evidence that the employer had likely terminated the complainant in part because of her sex. The Court of Queen's Bench held that "some evidence of a likelihood" (emphasis in original) that sex was part of the consideration to terminate the complainant was insufficient to shift the burden to the respondent. In any case, the Court held that the legal burden of proof did not shift to the employer, relying on Texas Department of Community Affairs v. Burdine. The Alberta Court agreed with the holding in Burdine that the burden on the respondent is an evidentiary burden rather than a legal burden; the respondent merely has to come forward with "some" evidence to rebut the case established by the complainant. The court stated further that there was nothing in the statute or policy of the legislation that a legal burden should be on the respondent "in any circumstances to prove that his conduct was non-discriminating".

The scheme set out by the Alberta Court of Queen's Bench in Base-Fort Patrol may not be appropriate under the Charter. The onus for justifying a limitation is clearly on the government: this is a legal burden. Since there is a presumption in favour of individual rights (Hunter v. Southam), the plaintiff bringing an action under section 24 merely has to show that her rights were infringed in order to shift the burden to government.

Although for the most part, the onus requirements will be essentially the same in constructive discrimination cases as in direct discrimination cases, there are some aspects of the burden on the plaintiff which should be pointed out separately. There are two ways in which the plaintiff could satisfy the onus when asserting disproportionate impact. When there is a requirement which an otherwise qualified plaintiff clearly cannot meet, for example, because of his religion, there will be a prima facie case of constructive discrimination (Malik). For example, in Bhinder vs. Canadian National Railways, the requirement of wearing a hard hat and the requirements of the Sikh faith come into obvious conflict. That conflict establishes a prima facie case that the condition imposes a greater burden on Bhinder than on persons not sharing Bhinder's religious beliefs. Eberts stated that there was a "presumption" of discrimination in such cases (Malik). The onus on the complainant is just to show disproportionate impact on members of the (protected) group to which he belongs.

In other cases, for example, height and weight requirements, evidence that there is in fact a disproportionate impact on a protected group will be necessary to make a prima facie case. In Dothard v. Rawlinson, 433 U.S. 405 (1977), the U.S. Supreme Court stated:

> to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.

The employer then has the opportunity to show the requirement is job related and if it is successful, the plaintiff may show there are alternative ways of meeting the employer's needs.

The Tribunal in A.T.F. v. C.N. stated that under section 10 of the Canadian Human Rights Act the complainant must provide "prima facie evidence that the disputed hiring practices are such as to deny a protected group the same employment opportunities as other applicants". It goes on to indicate that "statistics would tend to provide such prima facie evidence, since the proportion of women hired by C.N. for the positions covered by the complaint was substantially lower than the average among employers in similar sectors". The Tribunal added a second requirement that "the complainant must also prove that the disputed hiring practices were adopted for the purpose of lessening the employment opportunities of a protected group".

The British Sex Discrimination Act and Race Relations Act, both of which prohibit constructive discrimination, require that the complainant show that the requirement has a disproportionate impact on women or on persons of a particular race and if that is done, "the burden shifts to the respondent to justify the requirement or condition" (Pannick, 903).

Because the prohibition against constructive discrimination in concerned with opportunity or fair consideration, the complainant under the British Law does not have to show "that but for the impugned requirement or condition she would have been appointed to the job or received whatever other benefit (or avoided whatever other advantage) is in question" (Pannick, 905). The plaintiff has only to show that she was denied the opportunity involved. In Price v. Civil Service Commission, an English case, Price was excluded from consideration for a job because she was over the maximum age of 28:

> She claimed that the age ban had a disproportionate adverse impact on women because they tend to return to work after bearing and rearing children. The EAT held that the employer's response, that women "can comply" with the age requirement because they are not obliged to have or to rear children, was "wholly out of sympathy with the spirit and intent of the Act" and that
>
>> "It should not be said that a person 'can' do something merely because it is theoretically possible for him to do so: it is necessary to see whether he can do so in practice. Applying this approach to the circumstances of this case, it is relevant in determining whether women can comply with the condition to take into account the current usual behaviour of women in this respect as observed in practice, putting on one side behaviour and responses which are unusual or extreme" (Pannick).

This approach would appear to be applicable equally to the Canadian human rights context and can be argued to be an appropriate approach to the Charter.

Finally, it will often be more difficult for an individual who believes he or she has been the victim of constructive discrimination to make a prima facie case under section 15 than for an individual who makes a claim of direct discrimination. Assuming that the test of reasonableness will be left to section 1, the latter merely has to show adverse discrimination (basically denial or rejection on a prohibited ground without consideration on his or her merits or an explicit classification on a prohibited ground). However, the plaintiff in a constructive discrimination case will usually have to marshall statistical and other evidence of disproportionate impact sufficient to satisfy a court that this is indeed discrimination within the meaning of section 15 and not a minor, incidental effect.

In some cases of constructive discrimination, it will be necessary to tie the lack of opportunity to past treatment or inability to enjoy the benefit, or to future anticipated patterns of discrimination, or some other factor which makes the effect more than incidental. Thus if in the year in which the action is brought under the Charter, more men benefit from a particular law than women but in the year previously, more women benefited and it is not possible to show a pattern of effect based on the kinds of factors referred to above, then the effect on women is merely incidental and would not constitute discrimination under section 15. Put briefly, the constructive discrimination doctrine is not concerned with chance or "the vagaries of fate" but, as is direct discrimination, with the failure to treat equally persons with certain characteristics.

(c) Evidence to be Produced by Plaintiff under Section 15

The following discussion is merely intended to indicate the type of evidence a plaintiff might produce in order to make a prima facie case.

Under Canadian human rights law, "it is sufficient to substantiate a complaint if a discriminatory practice is one of the proximate causes of refusal to employ" (Carson (Review Tribunal) emphasis added; Niedzwiecki vs. Beneficial Finance System (1981), 3 C.H.R.R. D/1004 (Ont.); Waplington v. Maloney Steel Ltd. (1983), 4 C.H.R.R. D/1262, upheld by the Alberta Court of Appeal (1983), 4 C.H.R.R. D/1483; Cameron v. Nel-Gor Nursing Home). The proximate cause view is based on R. v. Bushnell Communications Ltd. (1973), 45 D.L.R. (3d) 1218, aff'd. (1974), 47 D.L.R. (3d) 669 (C.A.).

Statistics may assist the plaintiff in making a prima facie case. In Offierski v. Peterborough Board of Education, Offierski was a female teacher who had been rejected for a vice-principal's position and had difficulty gaining admission to a course which was prerequisite to the vice principalship. There was no explicit rule which prohibited female teachers from being promoted. Over the years, however, women had not been promoted to the same extent as men.

Offierski submitted statistics for Ontario and Peterborough showing far fewer female than male vice-principals, principals and heads of departments, even though teachers in Ontario are comprised about equally of men and women. There are fewer female applicants for the positions, a fact explained in the case as resulting from systemic factors. The Board found that the statistics showing the low numbers of women in administrative positions would have provided a prima facie case of discrimination except for the low numbers of applicants -- even though there was a recognition of the reasons for the low number of applicants.

Although not specifically relevant to the facts of the case, the Board in Ingram v. Natural Footwear (1980), 1 C.H.R.R. D/59 stated that statistics showing a pattern of dismissals (in relation to race, for example), may help to constitute a prima facie case. In Malik, Professor Eberts pointed out that Malik could have introduced statistics that the interview process has "over time resulted in a disproportionately high rate of rejection for people of traditional Muslim and Pakistani backgrounds".

In one U.S. case, the percentage of women in various Federal agencies and the percentage of women holding similar jobs outside the agency in question were compared. Such a comparison can establish an inference of bias (De Medina v. Reinhardt, 30 EPD No. 33014 (1982)). In another case, evidence of discrimination included the proportion of blacks hired according to the employer's records relative to available black workers (YNO N-451, EEOC Practice Decisions 1968-1973). In that case, word-of-mouth recruitment conducted by a substantially all-white work force without supplementary and simultaneous recruitment in the minority community "constituted a prima facie violation" of the Civil Rights Act of 1964. In another EEOC decision (No. 71-345 (1970)), a comparison between the minority component of the local population (40%) and the minority members hired (none for the specified position) constituted a prima facie case. And statistics may establish a prima facie case even where subjective factors, such as collegiality, are involved (Anderson v. City of Albuquerque, 30 EPD No. 33098 (1982) (U.S. Court of Appeals, 6th Cir.). The overall hiring pattern of the City established a prima facie case of sex discrimination).

In Dothard, the U.S. Supreme Court struck down height and weight requirements for prison guards and (correctional counsellors) since there was "gross disparity between the female and male exclusions" as a result of the requirements (minimum 5 feet 2 inches and 120 pounds and maximum 6 feet 10 inches and 300 pounds). The requirements were not shown to be job related. The evidence was that the lower height requirement excluded 33.29% of women between 18 and 79 and 1.28% of men; the lower weight requirement restricted 22.29% of women and 2.35% of men; taken together (because some persons would be excluded by both requirements and some by only one or the other requirement), they would exclude 41.13% of women and less than 1% of men.

In Dothard, the statistics were based on national statistics; the Court rejected the argument "that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants". By contrast, in the British case of Price v. Civil Service Commission, the Employment Appeal Tribunal took a different position than the U.S. Supreme Court in Dothard; the EAT stated that the comparison is of the relevant pool of men and women, persons qualified for the position in that case (Pannick).

EEOC v. Greyhound, 635 F.(2d) 188 (1980) (U.S. Court of Appeals), 3rd Cir.) involved an allegation that Greyhound's no-beard policy had a disparate impact on blacks because blacks were vulnerable to a skin condition which prevented their shaving. The EEOC failed to establish a prima facie case because it did not establish a connection between the skin condition and race. The majority in the Court of Appeal stated:

> To establish a prima facie case, EEOC was required to prove that Greyhound's policy had a greater impact on blacks than on whites. It has shown, at most, only that the policy weighed more heavily on individuals who have PFB than on those who

> do not. Without comparative statistics showing the percentage of white males who suffer from diseases or skin conditions that make shaving painful or impossible, EEOC's evidence that many black males are unable to shave because of PFB simply does not permit the inference of a disproportionate impact.

Contrary to the majority view of the Court of Appeals in EEOC v. Greyhound, the Supreme Court in Dothard had stated statistical evidence was not necessary to making a prima facie case, although statistics actually constituted the basis for the Dothard decision.

And the majority in the Court of Appeal in Greyhound went on to hold that EEOC also had to show that "enforcement of the policy resulted in actual discrimination in the employer's workforce". Not only did EEOC not do that but Greyhound produced statistics that "the percentage of black male employees to total male employees in jobs at the Philadelphia terminal covered by the no-beard policy has exceeded substantially the comparable percentage of black males in the labour force and in the general population" of Philadelphia.

Sloviter J. dissented, stating that the requirement of showing a disproportionate impact on the composition of the workforce (rather than on the protected class) was a new rule without support from any Supreme Court case. His reasons for rejecting this view are set out at length because they are a clear statement of its defects:

> This deceptively subtle transformation of the disparate impact method of proving discrimination can have a devastatingly deleterious effect on enforcement of Title VII. Although the majority does not discuss the implications of its rule, it is apparent that it will mean that an employment policy

> which excludes applicants as a result of a race-linked characteristic will, nonetheless, not be considered to have a disparate impact upon members of that race if the percentage of that racial minority in the employer's workforce is equal to the percentage of that minority in the general population. This rule would establish by judicial fiat an invidious quota defense since a black applicant, excluded solely because of inability to comply with the employment policy, will be deprived of his or her employment opportunities because the employer has already hired the required percentage of blacks.
>
> The majority thus inverts the use of population statistics heretofore recognized in Title VII cases by creating the percentage of that minority in the labor force or in the general population as the outer limit to which an employer is obliged to extend its hiring. Population statistics have been considered relevant in Title VII cases because gross underrepresentation of minorities in the employer's workforce may reflect discrimination unless some other factor, such as unavailability of qualified minorities, can be shown to exist. Even under the majority's view holding workforce percentages relevant in determining impact, it would be necessary, at a minimum, to consider whether, in the absence of the disputed policy, there might be an even higher percentage of black employees. It is more than likely that jobs at Greyhound and at other bus companies might have particular attraction to blacks who are still deprived of equal employment opportunities in certain other industries or who may still suffer from earlier educational deprivations in their quest for employment in certain other fields.

He contrasted the majority's approach with the Supreme Court's treatment of similar evidence in Phillips v. Martin Marietta Corp., 91 S. Ct. 496 (1971). There Martin Marietta did not consider women with preschool-age children for employment. Although there was a higher proportion of women employed than actually applied, relative to the total workforce and applicant pool, the Court related the statistics merely to the issue of intent, not to disproportionate impact.

It may be that statistics showing only a small difference in impact will be insufficient to make a prima facie case. In R. v. Videoflicks Mr. Justice Tarnopolsky stated that "[w]hether the adverse consequences that flow from any particular rule or regulation amounts to religious discrimination, will have to be determined on all the facts of the case" and that "I do not see differences by way of mere regulation of time and place [with respect to the sale of videos] as having such adverse impact as to constitute discrimination" (emphasis added).

But statistics are not the only way to make a prima facie case in human rights cases. In Dothard, the U.S. Supreme Court stated that the plaintiffs in such a case "are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact". The same approach has been taken in the British cases, some of which have been referred to above. Statistics are not always necessary and in fact inadequate statistical evidence may not be a bar to establishing a prima facie case.

In one case, the EAT held that "'it is most [un]desirable that, in all cases of indirect discrimination, elaborate statistical evidence should be required before the case can be found proved', especially given the time and expense that would involve". The respondent had not produced conflicting evidence to contradict what in itself was statistically inadequate evidence because it was based on an insufficent and non-representative sample. Another tribunal used "common sense" to find that a requirement to work full-time to avoid redundancy placed a greater burden on women "bearing in mind women's current or usual behaviour of working part-time in greater proportions than do men". Pannick concluded that "[a]s in cases of direct discrimination, tribunals should be prepared to draw inferences from the primary facts" (Pannick).

Expert evidence may also be submitted, as it was in Malik. Expert evidence was presented to show that someone with Malik's background would be very deferential, non-assertive, low-key and rigid, unable to adjust when the interview did not progress as expected. These were characteristics which seemed to be responsible for Malik's low score. However, Malik failed to establish a connection between those qualities and membership in a particular ethnic group.

Evidence of a pattern of discrimination may be relevant, as in McDonald v. Knit-Rite Mills Ltd. Faced with O'Malley (Ont. C.A.) and Bhinder (F.C.A.), which held that intent to discriminate was required under the 1980 Ontario Human Rights Code and the Canadian Human Rights Act, respectively, the Adjudicator felt compelled to distinguish Knit-Rite from the neutral standard cases. He therefore characterized the case as "one in which differential treatment of men and women occurred not as the result of the application of a standard or normative rule but, rather, because different standards, in this case rates of pay, were applied to the men and women in the cutting room simply on the basis of their sex". Since there was no explanation for the wage differentials, the Adjudicator inferred intention to treat men and women differently. Since the existing wage scales were a proximate factor, they were sufficient for a finding of discrimination, although non-discriminatory factors may also have played a part. Furthermore, "job assignments appear consistently to have favoured the men". The Adjudicator concluded: "The classification here complained of resulted directly from these earlier forms of sexual discrimination and therefore was itself discrimination."

The dissenting opinion in Jorgensen v. B.C. Ice and Cold Storage (1980), 2 C.H.R.R. D/289 (B.C.) reached the conclusion that sex was a factor in the employer's refusal to permit Jorgensen to perform certain work by examining the treatment of women by the employer. Assumptions were made about Jorgenson's low productivity because it was believed the women as a group had low productivity. The history of the division of labour which segregated men and women appears to have been carried forward in new facially neutral policies. The test given to one woman (not Jorgensen) to help determine whether women should be given other work was "something of a 'show trial'", indicating the Company's attitude. In addition, some of the male employees had indicated they did not want to work with women. In comparing the treatment of male and female employees, it seemed that male workers with similar problems were never required to do the work considered as "women's work". The women were expressly told that they would have to perform all the work in the "male" category, even though the men were not told that and usually did not do so in fact. All of this evidence (considered with evidence showing otherwise) demonstrated to the dissenting members of the Board that on a balance of probabilities the complainant's sex was a relevant factor in the treatment of the complainant by the company.

Where hidden intention or a showing that a facially-neutral law is really a subterfuge for enacting discriminatory legislation is in issue, the plaintiff would have to be prepared to provide evidence which showed the actual intent. This evidence might be a combination of circumstantial and direct evidence in conjunction with statistical evidence. In the United States, where constructive discrimination is recognized under the equal protection clause only if hidden intent can be found, the Supreme Court has indicated the kind of evidence that might be relevant in Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977).

> The impact of the official action [may] provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the government legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in [Gomillion v. Lightfoot, 364 U.S. 339 (1960)*] or Yick Wo, impact alone is not determinative, and the Court must look to other evidence.
>
> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision may also shed some light on the decisionmaker's purposes... Departures from the normal procedural sequence

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* In Gomillion, an Alabama law redefined the city boundaries of Tuskagee with the consequence that the shape of Tuskagee was changed "from a square to an uncouth twenty-eight sided figure" and removing from the city "all save only four or five of its 400 Negro voters while not removing a single white voter or resident". The court found that the law was a device to disenfranchise blacks in violation of the 15th Amendment and was "solely concerned with segregating white and coloured voters by fencing negro citizens out of town so as to deprive them of their free-existing municipal vote".

> also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached. The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.

(d) Remedies under Section 24(1)

> 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

This section considers very briefly some possible remedies under section 24 of the Charter.

It should be pointed out that a plaintiff has several steps to overcome before the court may grant a remedy for an infringement. The plaintiff must show:

1. she is a proper plaintiff;

2. that the court has jurisdiction;

3. that the right being claimed actually falls within one of the rights guaranteed by the Charter;

4. that the right has been infringed or denied; and

5. the appropriateness of the requested remedy.

The courts' jurisdiction to fashion an appropriate remedy under section 24 is very wide. Section 24 permits the court to order whatever remedy "the court considers appropriate and just in the circumstances". However, section 24 does not permit the court to order a remedy not within its jurisdiction prior to the Charter (Re Hussey et al. v. Attorney General for Ontario et al. (1984), 46 O.R. (2d) 554 (Div.Ct.); leave to appeal denied). Further, in the Inflation Restraint Act case, the Court of Appeal held that "[i]t is common ground that to meet [the requirement of compentent jurisdiction] the court must have jurisdiction, independently of the Charter, to grant the remedy sought". This view was confirmed by Madame Justice Wilson, the Chief Justice and Lamer J. concurring, in Singh v. Minister of Employment and Immigration (pp.72-73).

Mr. Justice Deschênes in the Quebec School Boards case and Mr. Justice Scheibel in Couture both indicated that a declaration is available under section 24(1). Mr. Justice Scheibel suggested two cases in which the declaratory remedy under section 24(1) may be of value to a plaintiff. The first is "where a person is convicted of an offence by operation of a statute, and that statute is subsequently declared invalid, the declaration will result in an aquittal, and is therefore a means of redress"; the second instance is where a declaration of invalidity "will prevent an impending violation of the person's rights".

Section 24 will undoubtedly give rise to claims for injunctions. One injunction which might be relevant in Charter cases is the structural injunction which has been used in the United States in civil rights cases (Fiss). Fiss defines the structural injunction as "the injunction seeking to effectuate the reform of the social institution" (Fiss, 9). He points out that it was used to desegregate the school system primarily but has also been used to restructure other institutions, including hospitals and prisons, "not just to vindicate a claim of racial equality, but also to vindicate other claims, such as the right against cruel and unusual punishment or the right to [medical] treatment" (Fiss, 10).

In order for the structural injunction to be most effective, the court will have to supervise the rearrangement of the institution. This would come into conflict with the Canadian courts' general preference not to monitor remedies. On the other hand, this necessity would really arise out of the intransigence of government in responding to court orders. Unlike the situation in some southern states in relation to racial segregation, it is almost impossible to conceive of this happening in Canada, particularly in light of section 33.

An important distinction between the American and Canadian experience is that the structural injunction was developed in the United States at a time when the declaratory remedy was not well developed; in Canada it is well developed and there is less need to require the structural injunction. On the other hand, a declaration brings with it no sanction, whereas the injunction does and in some cases the latter may therefore be preferable.

It also remains unclear, and is doubtful, whether the effect of section 15 will overcome the courts' reluctance at common law to enforce a personal service contract. Under human rights legislation, boards can order reinstatement. Under the Charter, the remedy may be limited to loss of wages and other damages.

Professor Tarnopolsky (now Mr. Justice Tarnopolsky) in his book, Discrimination and the Law in Canada, provided a survey of remedies under human rights legislation (Tarnopolsky, Discrimination, 488 ff.). Beginning in 1972, boards have awarded damages for humiliation, hurt feelings, loss of reputation and similar injuries. The awards have ranged up to about $3,000. In the employment context, awards of lost wages have been made, along with reinstatement and "invitation to apply for the job". At least one order of physical accommodation of premises has been made. A similar range of remedies is likely to be sought under section 24 for an infringement of section 15 (with the possible exception of reinstatement and damages for humiliation). In addition, courts may be asked to award back benefits when benefits, such as unemployment insurance, have been improperly denied.

The Board in Hendry v. Ontario Liquor Control Board permitted the Ontario Human Rights Commission to help set up a program with the Liquor Control Board in order to redress the inbalance between male and female workers. Section 15(2) may permit courts to order special programs (affirmative action) when requested by a plaintiff. The affirmative action program as remedy has been considered above. Such a remedy would be particularly appropriate in cases of systemic discrimination where a member or members of an identifiable class have been denied benefits or positions over a period of time. The courts may be reluctant to order affirmative action both because it is not personal to the plaintiff and because of their reluctance to monitor remedies. However, while this remedy would not be personal to the plaintiff, it could in appropriate circumstances be in keeping with the purpose of section 15's equality guarantees. And the courts may be more willing to make an order for a loosely structured special program than for one with many interrelated requirements.

It appears that exclusion of evidence is not a remedy available under section 24(1). In Therens, six members of the Supreme Court of Canada agreed that the exclusion of evidence could be ordered only under section 24(2) and that therefore the only standard for exclusion was that admitting the evidence would bring the administration of justice into disrepute. Two members of the Court voiced no opinion on this issue.

SUMMARY OF PAGES 427-439

2. Section 1

(a) Onus on the government under section 1

The Supreme Court of Canada has held that the onus is on the government.

(b) When shift in onus occurs

Once plaintiff establishes a *prima facie* case that there has been an infringement of equality, the onus shifts to the government to justify it under section 1.

(c) The effect of a finding that legislation is inconsistent with the Charter

Once the court finds that legislation is inconsistent with the Charter, section 52(1) mandates that it will be of no force and effect. The legislation will have been unconstitutional as of April 18, 1985 in instances of a section 15 challenge and April 18, 1982 with respect to challenges brought under other sections.

The Supreme Court of Canada held that courts will not rewrite legislation nor read it down in order to save legislation or a provision in legislation otherwise inconsistent with the Charter.

These are clearly factors which are relevant to a justification under section 1. Yet it is just as clear that His Lordship was applying them at the section 2(d) stage, for he continued:

> if I am wrong in this conclusion and the Act does violate s.2(d) of the Charter, nonetheless the legislation is saved by s.1.

The justification under section 1 was the necessity to resolve the impasse between the two sides for the common good.

Mr. Justice Tarnopolsky also seemed to suggest the tests are interchangeable, or at least he treated them as if they are. After considering in R. v. Videoflicks whether regulations in regard to the sale of videos constituted an infringement of section 2(b) and finding they did not because there was no evidence of adverse impact, he went on

> If what I suggested is more applicable to the test of what is a reasonable limit under s.1 of the Charter, rather than to what is the essence of an infringement of s.2, then I would have no difficulty in concluding that the regulation under the Act is so obviously such a reasonable limit that there is no need to require proof thereof by the Attorney General.

While Sirois J. considered section 1 factors under section 2(d), Tarnopolsky J.A. did consider only section 2(b) factors under section 2(b) but appears to have been prepared to consider them as equally applicable under section 1.

(c) The Effect of a Finding that Legislation is Inconsistent with the Charter

Section 52(1) of the Constitution Act mandates the

2. Section 1

(a) Onus on the Government under Section 1

The Supreme Court of Canada has now affirmed unequivocably in Hunter v. Southam that the onus under section 1 is on government:

> The phrase "demonstrably justified" puts the onus of justifying a limitation on a right or freedom set out in the Charter on the party seeking to limit (p.169).

(b) When the Shift in Onus Occurs

The issue now is when the shift of the onus from the plaintiff to government will occur. This has been discussed in the section on the plaintiff's onus above. Some courts appear to have merged the issues to be addressed under section 1 and the right/freedoms sections. This has occurred not only with the "qualified" rights, such as sections 8 and 12, where it is perhaps understandable (see above, pp.121ff), but also with respect to more clear-cut rights. In the Dairy Workers Act case, Sirois J. cited the following factors as the reason for not finding an infringement on the right to association:

> irreconcilable differences existing between the dairies and the unions, the breakdown of collective bargaining, the failure of conciliation and the imminent threat of a strike on the one hand and a lockout on the other in this essential industry, [and] the harm that would ensue not only to the dairy producers but to the entire population at large.

effect on legislation which a court has found to be inconsistent with the Charter. It states:

> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Section 52 is a clear statement that legislation must meet the demands of the Charter (unless subject to the section 33 override). Where and to the extent* that a court finds that legislation does not satisfy the Charter, the legislation will have no further effect. The Supreme Court has now established that the courts are not to "rewrite" legislation in order to ensure compliance with the Charter.

In the Manitoba Language Reference, the Supreme Court of Canada made it clear that under certain circumstances, it has the power to delay the implementation of a declaration of inconsistency, or, as the Court put it, to deem legislation to be "temporarily ... enforceable and beyond challenge" (p.66). However, it must be noted that the consequences of the declaration in that case were extremely serious, warranting the description "state of emergency" (p.63). All legislation passed by Manitoba since 1890 was declared invalid because it had been enacted in English only, contrary to the constitutional requirement that it be enacted in both English and French. The legislation would not be valid until it had been re-enacted in both official languages, a task which obviously would take considerable time. Accordingly, the Court was prepared to deem the legislation passed since 1890 "temporarily valid and effective from the date of this judgment to the expiry of the minimum period necessary for translation, re-enactment, printing and publishing" (p.65). However, any legislation enacted in only one official language after the date of the judgment would be of no force or effect.

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* For an example of a case in which the court struck down a portion of a statute, see Canadian Newspapers Co. Ltd v. Attorney General for Canada (1985), 49 O.R. (2d) 557 (C.A.) (leave to appeal to S.C.C. granted April 24, 1985). Section 442(3) of the Criminal Code gives a judge discretion to make an order prohibiting publication of the name of a complainant in a sexual assault case. However, it also provides that the judge shall make such an order if the application is made by the complainant or prosecutor. This provision was challenged as infringing freedom of the press under section 2(b) of the Charter. The power to make a discretionary order was held to be a reasonable limit but the mandatory aspect of the provision was held not to be demonstrably justified. The mandatory clause could be severed since only that portion was inconsistent with the Charter. ("The valid portion of the subsection is not inextricably bound up with the invalid portion.")

The Manitoba government will not have to re-enact only current legislation, since any rights and obligations arising out of any legislation passed after 1890, are also of no force or effect pursuant to section 52. The Court held that many such rights and obligations and effects arising out of the invalid legislation could be saved by the application of certain legal doctrines, including the de facto and res judicata doctrines (the de facto doctrine is discussed at length at pp.44-48; other doctrines are referred to at pp.48 and 66). However, the doctrines will not be effective in all cases. Accordingly, the rights, obligations and effects arising out of invalid legislation were also deemed by the Court to be temporarily valid, until the re-enactment of all legislation which gave rise to them: "to ensure the continuing validity and enforceability of rights, obligations and any other effects not saved by the de facto or other doctrines, the repealed or spent Acts of the Legislature, under which these rights, obligations and other effects have purportedly arisen, may need to be enacted, printed and published, and then repealed, in both official languages" (p.66).

The Court justified its willingness to delay the effect of section 52 by the need to uphold the Rule of Law, both with respect to the need for legislation ("The Constitution will not suffer a province without laws." [p.64]) and with respect to the "chaos and anarchy" which would result "if the legal rights, obligations and other effects which have been relied upon by the people of Manitoba since 1890 were suddenly open to challenge" (p.49).

It should be noted that the Court did not base its decision to postpone the effect of section 52 simply on a discretion to do so, but rather justified it on the basis of the extreme situation facing Manitoba as a consequence of its holding that almost all the province's laws were invalid: "declaring the Acts of the Legislature of Manitoba invalid and of no force or effect would without more, undermine the principle of the Rule of Law" which means both that arbitrary power cannot be countenanced and that "an actual order of positive laws" be created and maintained. Not to ensure the continuation of the Rule of Law (as would result if the legislation were declared of no force and effect immediately) would in itself undermine the Constitution*. Thus it is to enforce the Constitution that the delay in the effect of section 52 must be allowed (pp.37-40). It is, of course, not clear what conditions short of "chaos and anarchy" and the failure of the Rule of Law would suffice to permit a delay in the implementation of section 52.

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* The Court determined that the Rule of Law was a constitutional principle by reference to the preamble of the Constitution Act, 1982 ("Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.") (p.36) and by having "regard to unwritten postulates which form the very foundation of the Constitution of Canada" (p.40).

Hunter v. Southam Inc. considered the validity of s.10(1) of the Combines Investigation Act, which authorized the Director of Investigation and Research of the Combines Investigation Branch to authorize Combines Investigation officers to enter and to conduct searches and seizures. Chief Justice Dickson, delivering the opinion of the court, stated:

> [R]easonable and probable grounds established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search constitute the minimum standard, consistent with s.8 of the Charter, for authorizing search and seizure. Insofar as ss.10(1) and 10(3) of the Combines Investigation Act do not embody such a requirement, I would hold them to be further inconsistent with s.8 (p.168).

The government argued that if the Act did not specify a standard consistent with s. 8 for authorizing entry, search and seizure, it should not be struck down as inconsistent with the Charter, but rather that the appropriate standard should be read into these provisions. The court refused to accept this submission, stating:

> While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae

> constitutional. Without appropriate safeguards legislation authorizing search and seizure is inconsistent with s. 8 of the Charter. As I have said, any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The principle that it is not the judiciary's role to redraft legislation was also expressed by Mr. Justice Tarnopolsky in his decision for the Ontario Court of Appeal in R. v. Videoflicks. In that case the Court held that s. 2 of the Retail Business Holidays Act, which proscribed the operation of most retail businesses on Sundays and certain other holidays, was inconsistent with the Charter only to the extent that it did not provide for adequate religious exemptions. The Court refused to provide for the deficiency stating: "What is required is a re-drafting of s.3(4) [the exemptions section] to meet the requirements of the Charter. This is not the role of the judiciary...The criteria which a new exemption section must meet have been described."

A second principle arises from the decision in R. v. Videoflicks and the earlier Ontario Court of Appeal decision R. v. Rao. These cases were decided on the principle that there is a distinction between the invalidation of a statute and a finding that a statute is inoperative in the circumstances before the court. In relation to the Charter, this principle has not yet been approved by the Supreme Court of Canada.

In Rao, for example, the court considered the validity of s.10(1)(a) of the Narcotic Control Act, which authorized a peace officer, in certain circumstances, to enter and search any place other than a dwelling house without a warrant. Mr. Justice Martin, delivering the opinion of the court, stated:

> Section 10(1)(a) does not on its face necessarily clash with s.8 of the Charter although in some circumstances a warrantless search authorized by that subsection may, in fact, infringe the constitutional requirement of reasonableness secured by s.8 of the Charter, depending upon the circumstances surrounding the particular search. The statute is inoperative to the extent that it authorizes an unreasonable search...
>
> In R. v. Oakes (1983), 2 C.C.C. (3d) 339, this Court held that s. 8 of the Narcotic Control Act was unconstitutional because the reverse onus clause which was an integral part of the section contravened the presumption of innocence secured by s.11(d) of the Charter. The Court in that case held that it was not entitled to rewrite the provisions of s.8 of the Act or to apply it on a case by case basis, depending upon whether the facts of a given case made the presumption created by the section reasonable. The presumption created by the section was on its face unreasonable and hence could not survive when measured against the Charter's guarantee of the presumption of innocence. In my view, the warrantless search powers conferred by s.10(1)(a) of the Narcotic Control Act are not on their face necessarily unreasonable and do not necessarily collide with the Charter, although warrantless searches authorized by s.19(1)(a) may in some circumstances, come into collision with the Charter's protection against unreasonable searches and seizures. It is not like the reverse onus contained in s.8 of the Narcotic Control Act which on its face collided with the presumption of innocence secured by s.8 of the Charter. The right to be presumed innocent prescribed by s.11(d) of the Charter is a concept of fixed meaning (even if there is not universal agreement as to that meaning), whereas whether a particular search and seizure, under statutory authority, meets the standard of reasonableness may depend upon the circumstances surrounding that search and

> seizure. Accordingly, I do not consider that s.10(1)(a) is unconstitutional, but hold that it is inoperative to the extent that it is inconsistent with s. 8 of the Charter. In my opinion, s.10(1)(a) is inoperative to the extent that it authorizes the search of a person's office without a warrant in the absence of circumstances which made the obtaining of a warrant impracticable; beyond that it is unnecessary to go in the present case.

Similarly, in R. v. Videoflicks, Tarnopolsky J.A. did not invalidate the Retail Business Holiday Act even though it was inoperative to the extent that it conflicted with the Charter rights of one of the appellants (Nortown Foods Ltd.). Rather, he stated:

> In accordance with s.52(1) of the Constitution Act 1982, the Act 'is inconsistent with the provisions of the Constitution' and is 'to the extent of the inconsistency, of no force or effect'. I have already held that the Act is inconsistent only to the extent that it does not provide for adequate religious exemptions. Otherwise s.2 of the Act is valid in its application to all appellants who cannot make such a claim sincerely or genuinely ...
>
> For the purpose of disposing of these appeals it is sufficient to hold that s.2 of the Act is of no force or effect as concerns Nortown Foods Ltd. and so its appeal is allowed, the conviction is quashed and a verdict of acquittal is directed to be entered. With respect to all other appellants, their appeals are dismissed to the extent they are based on this ground.

The distinction between a law which is invalid per se and a law which is simply inoperative in its application to a particular set of circumstances has long been recognized in the

United States: "Ordinarily, a particular litigant claims that a statute is unconstitutional as applied to him or her; if the litigant prevails, the courts carve away the unconsitutional aspects of the law by invalidating its improper applications on a case-by-case basis" (Gunther, 1186). In a "conventional" constitutional challenge a litigant may raise only his "own" rights, not those of others; thus he can challenge a statute only "as applied" to him (United States v. Raines, 362 U.S. 17,22 (1960)).

Nor is the distinction between facially invalid laws and laws which are unconstitutional as applied new to Canadian constitutional jurisprudence. It is the distinction between "laws which are not valid for any purpose whatsoever" and "laws which are too broad in their coverage and which are not valid, therefore, for some purposes only" (Cavarzan, 81). Of course, when this concept is employed by the courts to deny the application of the law, it is on the basis that the Legisature could not have intended that the scope of its legislation would extend beyond its powers.

The courts of the United States have had over one hundred years of experience in this area. In another context, it has been said that "it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States Courts" (Skapinker, p.367). However, it must be remembered that "American decisions can be transplanted to the Canadian context only with greatest caution" (Hunter v. Southam, p.161).

An American court sustaining an equal protection claim is faced with two remedial alternatives:

> [it] may either declare [the statute] a

> nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion (Welsh v. United States, 398 U.S. 333, 90 S. Ct. 1792 (1970); Heckler v. Mathews, 104 S. Ct. 1387 (1984)).

Where the choice has been between "extension" and "nullification", the American courts have observed that ordinarily extension is the proper course (Califano v. Westcott, 443 U.S. 76, 99 S. Ct. 2655 (1979)). The court will not, however, "use its remedial powers to circumvent the intent of the legislature" (Califano), and will therefore "measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation" (Welsh; Heckler).

Accordingly, as Justice Brandeis explained, when the "right invoked is that of equal treatment", the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favoured class as well as by extension of benefits to the excluded class (Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 52 S. Ct. 133 (1931)). Consistent with this explanation the United States Supreme Court has often recognized that the victims of a discriminatory government program may be remedied by an end to a preferential treatment for others (e.g. Gilmore v. City of Montgomery, 417 U.S. 556, 94 S.Ct. 1426 (1974); Norwood v. Harrison, 413 U.S. 455, 93 S.Ct. 2804 (1973); Griffen v. County School of Board of Prince Edward County, 377 U.S. 218, 84 S.Ct. 1226 (1964)).

In R. v. Videoflicks, Mr. Justice Tarnopolsky held that the exemption provision should be extended to cover genuinely religious employers. Although he stated that the court was not to rewrite the statute, he may have done so implicitly by ordering that a verdict of acquittal be entered for Nortown Foods. On the basis of Southam, one would have expected either the legislation or the provision to be struck down. However, Tarnopolsky J.A. struck down neither the legislation nor the exemption provision. He found section 2 of the Act to be inconsistent with the Charter, a defect which could have been remedied by an adequate exemption provision. However, he declined to strike down the existing exemption provision because to do so would leave no exemption available to religious minorities. Only one appellant had a genuine religious belief which could not be accommodated by the exemption and Tarnopolsky J.A. limited the effect of the "remedy" to that appellant, setting out in the process the same division of labour between the legislature and the courts referred to in Southam.

It seems that legislation which has been declared unconstitutional will have been unconstitutional as of April 18, 1982 with respect to all Charter rights other than section 15 and presumably as of April 18, 1985 with respect to section 15. Plantation Indoor Plants Limited v. Attorney General of Alberta, [1985] 3 W.W.R. 539, involved an injunction granted the Attorney General on January 27, 1982 against Plantation Indoor Plants prohibiting it from selling on Sunday contrary to the Lord's Day Act. The Lord's Day Act having been declared unconstitutional under section 2(a) of the Charter, McIntyre J., for the Court, stated that the injunction "could have been a valid injunction only until 18th April 1982 when the Canadian Charter of Rights came into effect" (p.541). Although plaintiffs may seek remedies under section 15 dating back to April 18, 1985, no doubt the courts will use their discretion under section 24(1) to decide in any given case how extensive the remedies should be.

The view that a declaration of unconstitutionality may take effect prior to the date of the declaration was also followed in The Manitoba Language Reference in which the Supreme Court of Canada held that legislation enacted and published in English only in Manitoba was invalid by virtue of section 52 of the Constitution Act, 1982 and had been invalid since 1890. In 1890, the Official Language Act which had made English the only official language in Manitoba had been passed. Although the Court permitted the Manitoba government time to translate, re-enact and re-publish its legislation passed since 1980*, it stated that any legislation which remained in English after the expiry of that non-specified period would be invalid and of no force or effect. The Court was prepared to hold a hearing to determine the appropriate period required by the Manitoba government to accomplish the necessary translation and re-enactment (pp.66-67).

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* The Court applied certain legal doctrines, including the de facto doctrine and res judicata, to ensure that at least some of the "rights, obligations and other effects arising out of actions performed pursuant to invalid Act of the Manitoba Legislature" would be saved.

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